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MASSACHUSETTS REPORTS

200

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

OCTOBER 1908 — JANUARY 1909

HENRY WALTON SWIFT

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1909

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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Hon. JAMES MADISON MORTON.
Hon. JOHN WILKES HAMMOND.
Hon. WILLIAM CALEB LORING.
Hon. HENRY KING BRALEY.
Hon. HENRY NEWTON SHELDON.
Hon. ARTHUR PRENTICE RUGG.

ATTORNEY GENERAL

Hon. DANA MALONE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CHARLES B. MAYNARD *vs.* ROYAL WORCESTER CORSET COMPANY.

Worcester. September 28, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Construction, Performance and breach. *Damages. Evidence. Practice, Civil*, Requests for rulings.

At the trial before a judge without a jury of an action of contract for salary alleged to be due to the plaintiff from the defendant, a corporation, a question at issue was, whether the plaintiff was employed for a year or for a shorter period. There was evidence tending to show that the plaintiff was a director of the defendant and had been employed also to perform other services than those of a director for several years, receiving his pay weekly, that the financial year of the defendant began December 1, that on December 9, 1904, the defendant's board of directors voted that the "salaries" of the president, treasurer, clerk, one B. and the plaintiff "be increased twenty per cent on the amount of their salaries for the year 1904," and the plaintiff was given such increase in one payment, that similar increases and readjustments of salary were made before the middle of December in each of the next two years, that early in December, 1906, one authorized by the defendant stated to the plaintiff, "Your salary for the coming year will be" a certain sum, that about the middle of September, 1907, the president of the defendant, who had authority to employ and discharge employees, notified the plaintiff that, unless he changed certain conditions, his "contract would terminate" January 1, and

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that the plaintiff replied "If you wish . . . I will accept and make my plans accordingly January first." *Held*, that there was evidence from which a finding was warranted that the employment of the plaintiff was for a yearly period ending November 30, which was by subsequent agreement extended to January 1.

At the trial of an action of contract for salary to the amount of $1,378 alleged to be due to the plaintiff from the defendant, there was evidence tending to show that the defendant had agreed to employ the plaintiff to January 1 of a certain year, and had discharged him without cause in the middle of the preceding September, that according to the agreement of employment there would have been paid to the plaintiff for the period from the time when he was discharged to January 1 the amount claimed in the declaration; and it appeared that the plaintiff made no effort to secure employment during that period and was of the opinion that he could not have secured a position if he had tried to do so, and that in December he was making arrangements to go into business for himself. The trial judge ruled that the measure of damages would be the difference between the salary promised to the plaintiff and what he could have earned in some other place or occupation, and found for the plaintiff in the sum of $685. The defendant excepted and contended that the plaintiff was entitled to recover only nominal damages. *Held*, that the finding of the judge was warranted.

In an action of contract for salary alleged to be due under a special contract with the defendant for a period during which the plaintiff was idle after being discharged without cause, in deciding whether or not the plaintiff made a *bona fide* effort to secure other employment, a judge hearing the case without a jury is not precluded from using his own knowledge of practical affairs or applying his judicial sense to the consideration of a matter of such common occurrence as securing employment.

A refusal by a judge, before whom an action at law is being tried without a jury, to grant a request that the plaintiff is not entitled to recover on a certain count of the declaration, is equivalent to a finding that the plaintiff is entitled to recover on that count.

CONTRACT for salary alleged to be due to the plaintiff from the defendant, the first count being for $961.50, alleged to be due for the period from September 21, 1907, to and including November 30, 1907; and the second for $416.66, for a period from December 1, 1907, to and including December 31, 1907. Writ in the Superior Court for the county of Worcester dated February 8, 1908.

There was a trial before *Gaskill*, J., without a jury, who found for the plaintiff in the sum of $685; and the defendant alleged exceptions. The facts are stated in the opinion.

The case was submitted on briefs.

W. E. Sibley & C. M. Blair, for the defendant.

J. S. Gould, for the plaintiff.

RUGG, J. This is an action of contract, by which the plaintiff seeks to recover from the defendant money claimed to be

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due on account of salary. There are two counts in his declaration, the first alleging salary due, under a contract for one year, to December 1, 1907, and the second that due under a separate contract for the month of December. The case was heard before a judge of the Superior Court, who found for the plaintiff in a sum less than the salary. The defendant's exceptions bring before us the questions whether all the evidence warranted a finding that there were contracts for stipulated periods of time between the plaintiff and the defendant, and whether there was sufficient evidence to warrant a finding as to damages.

A finding of a court upon matters of fact, like a verdict of a jury, cannot be revised on exception, unless it appears that there is no evidence to support it. The only questions open relate to the correctness of the rulings of law, and whether the finding of fact was warranted by the evidence, under the rules of law applicable. *Wylie* v. *Cotter*, 170 Mass. 356. *Worthen* v. *Cleaveland*, 129 Mass. 570. *Schendel* v. *Stevenson*, 153 Mass. 351.

The evidence was somewhat conflicting, but, having regard only to its aspects most favorable to the plaintiff, [as we must in passing upon the action of the judge of the Superior Court,] would justify a finding that he had been in the employ of the defendant for several years, with the duty, among others, of figuring costs; he was also a director of the company, and always received his pay weekly; the financial year of the defendant began on the first day of December, and on December 9, 1904, its board of directors voted that the salaries of the president, treasurer, clerk, one Bennett and the plaintiff "be increased twenty per cent. on the amount of their salaries for the year 1904"; a short time thereafter a single payment for the amount so voted for the year then just ended was made to the plaintiff; under date of December 20, 1905, the defendant's board of directors passed a vote respecting the same persons, that their "salaries . . . be increased twenty per cent. on the amount of their present salaries for the year 1905"; on December 12 or 14, 1906, the treasurer of the defendant said to the plaintiff, "Mr. Fanning requests me to say your salary for the coming year will be $5,000, and he also wished me to state that your last year's salary will be $5,000"; the salary for the year preceding had been $4,000, and $1,000 was

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immediately paid to the plaintiff, and the weekly payments thereafter made were on the basis of $5,000 per year; about the middle of September, 1907, Mr. Fanning, the president of the defendant, who was authorized to employ and discharge employees and fix their salaries, said to the plaintiff, that, unless he changed certain conditions, his contract would terminate January 1, to which the plaintiff replied, "If you wish . . . I will accept and make my plans accordingly January first." In the latter part of September the plaintiff was discharged without adequate cause.

Whether there is a contract for services for a definite period of time in any case depends upon all the attendant conditions surrounding the agreement, as well as upon its terms, when the latter are not specific and clear. Several features tend to support the contention that the plaintiff was employed for a year from the first of December, 1906. For three years at least there had been an annual readjustment of compensation, early in December. Where there has been a recognition of annual employment, the bare continuance of service after the expiration of the term without anything being said is of some importance in the inquiry, whether the contract of service is renewed by implication for the like period. *Dunton* v. *Derby Desk Co.* 186 Mass. 35. The word "salary" was used both in the vote of the board of directors for the years 1904 and 1905 and in the conversation between the treasurer of the defendant and the plaintiff, in describing the compensation which the plaintiff was to receive. This word is perhaps more frequently applied to annual employment than to any other, and its use may import a factor of permanency. *Henderson* v. *Koenig*, 168 Mo. 356. *People* v. *Myers*, 11 N. Y. Supp. 217. See *sub nomine* Burrill's Law Dictionary. The unit of time used in describing the compensation was one year. In many jurisdictions this fact standing alone is regarded as sufficient evidence of the term of employment, and perhaps this is the implication of *Nichols* v. *Coolahan*, 10 Met. 449. Although some courts hold that a hiring at so much a year, where no time is specified, is indefinite and may be terminated at will (see *Martin* v. *New York Ins. Co.* 148 N. Y. 117, *Pinckney* v. *Talmage*, 32 S. C. 364, *Prentiss* v. *Ledyard*, 28 Wis. 131, *Haney* v. *Caldwell*, 35 Ark. 156,

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Parlett v. *Guggenheimer*, 67 Md. 542, *Orr* v. *Ward*, 73 Ill. 318, *The Pokanoket*, 156 Fed. Rep. 241), the weight of authority is that this circumstance alone, in the absence of any other consideration impairing its weight, will sustain a finding that there was a hiring for that period. *Emmens* v. *Elderton*, 4 H. L. Cas. 624, 640. *Buckingham* v. *Surrey & Hants Canal Co.* 46 L. T. (N. S.) 885. *Foxall* v. *International Land Credit Co.* 16 L. T. (N. S.) 637. *Chamberlain* v. *Detroit Stove Works*, 103 Mich. 124. *Beach* v. *Mullin*, 5 Vroom, 343. *Moss* v. *Decatur Land Improvement & Furnace Co.* 93 Ala. 269. *Young* v. *Lewis*, 9 Texas, 73. *Kellogg* v. *Citizens Ins. Co.* 94 Wis. 554, 558. *Magarahan* v. *Wright*, 83 Ga. 773. *Smith* v. *Theobald*, 86 Ky. 141, 146. *Kirk* v. *Hartman*, 63 Penn. St. 97. *Luce* v. *San Diego Land & Town Co.* 37 Pac. 390. *Horn* v. *Western Land Association*, 22 Minn. 233. *Cronemiller* v. *Duluth Superior Milling Co.* 134 Wis. 248. *Jones* v. *Vestry of Trinity Parish*, 19 Fed. 59. Without reviewing the cases or analyzing the principles to determine which is the sounder view, it is enough to say that the use of the sum of money equivalent to a year's pay, in describing the amount which the plaintiff was to receive, was proper for consideration in connection with other incidents. The length of the term of service reasonably inferable as the understanding of the parties, from their words, course of dealing and other acts, was a fact to be determined upon all the evidence. Grouping all these circumstances, and giving them the color most favorable to the plaintiff, as the trial judge had a right to do, we cannot say that his finding, that the contract alleged in the first count was made, was unjustified. *Tatterson* v. *Suffolk Manuf. Co.* 106 Mass. 56. *Davis* v. *Ames Manuf. Co.* 177 Mass. 54.

The refusal to grant the fourth prayer of the defendant, to the effect that the plaintiff was not entitled to recover on the second count of his declaration, was equivalent to a finding that he was so entitled. See *Jaquith* v. *Davenport*, 191 Mass. 415, 418. This determination also is not without supporting evidence. The testimony of the plaintiff, that Mr. Fanning said to him in September that, unless certain conditions changed, his contract would end January 1, together with the plaintiff's reply that he would accept and make his plans accordingly for January 1, which perhaps carried a little further and clinched the proposition of Mr.

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Fanning, would authorize the finding of a contract for service, which included December.

The plaintiff testified that he made no effort to secure employment, from the time he was dismissed from the service of the defendant, on September 21, until January 1 following, and that he did not think he could have secured a position if he had tried during that time, and that in December he was making arrangements to go into business for himself. This was the only oral evidence, outside the amount of salary which he had received from the defendant, as to the damages sustained. It is strongly urged by the defendant that, on this state of the testimony, the plaintiff is entitled to recover only nominal damages. Where one is under contract for personal service, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest and intelligent efforts to this end. He cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party. *Olds* v. *Mapes-Reeve Construction Co.* 177 Mass. 41. *Ransom* v. *Boston*, 192 Mass. 299, 307; *S. C.* 196 Mass. 248. The amount of damages is to be determined by the wages which he would have earned under the contract, less what he did in fact earn or in the exercise of proper diligence might have earned in another employment.* *Cutter* v. *Gillette*, 163 Mass. 95. It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of some kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract. *Milage* v. *Woodward*, 186 N. Y. 252. *Porter* v. *Burkett*, 65 Texas, 383. *Bennett* v. *Morton*, 46 Minn. 113. *Beissel* v. *Vermillion Farmers Elevator Co.* 102 Minn. 229. *Hendrickson* v. *Anderson*, 5 Jones, 246. *Troy Co.* v. *Logan*, 96 Ala. 619. *Fitzpatrick Square Bale Ginning Co.* v. *McLaney*, 153 Ala. 000.

* The trial judge gave the seventh ruling requested by the defendant, which was as follows: "If a contract is proved by the plaintiff with the defendant and a breach of said contract proved, the rule or measure of damages would not be the salary promised but the difference between the salary and what he could have earned in some other place or occupation."

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King v. *Steiren*, 44 Penn. St. 99. *Barker* v. *Knickerbocker Ins. Co.* 24 Wis. 630, 638. *Hamilton* v. *Love*, 152 Ind. 641. *Mathesius* v. *Brooklyn Heights Railroad*, 96 Fed. Rep. 792. *Winkler* v. *Racine Wagon & Carriage Co.* 99 Wis. 184. *Larkin* v. *Hecksher*, 22 Vroom, 133. *Rosenberger* v. *Pacific Coast Railway*, 111 Cal. 313. *Roberts* v. *Crowley*, 81 Ga. 429. *Realty Co.* v. *Ellis*, 4 Ga. App. 402. *Fuller* v. *Little*, 61 Ill. 21. *Saxonia Mining & Reduction Co.* v. *Cook*, 7 Col. 569. *Chisholm* v. *Preferred Bankers' Assur. Co.* 112 Mich. 50, 55. *Boland* v. *Glendale Quarry Co.* 127 Mo. 520. *Chamberlin* v. *Morgan*, 68 Penn. St. 168. *Latimer* v. *York Cotton Mills*, 66 S. C. 135. If this view be correct, the defendant has no ground for complaint, because he introduced no evidence. It is not necessary to decide in the present case whether this is the correct rule. It is enough to say that the contrary view, which prevails in Kentucky, Mississippi and perhaps elsewhere (see *John C. Lewis Co.* v. *Scott*, 95 Ky. 484; *Shepherd* v. *Gambill*, 29 Ky. L. R. 1163; *Hunt* v. *Crane*, 33 Miss. 669) has not been distinctly adopted heretofore in this Commonwealth. *Busell Trimmer Co.* v. *Coburn*, 188 Mass. 254, 257, relied upon by the defendant as establishing this principle, was not an action between the employee and his employer, but one in which the plaintiff, the employer, sought to justify in an action on a written contract of indemnity against a third person a payment made to an employee for breach of contract of employment. Of course such a plaintiff is bound to make out his case by preponderance of the credible evidence, as does any other suing for money paid under the terms of a written contract. In *Ransom* v. *Boston*, 196 Mass. 248, it was plain that the plaintiff was voluntarily idle. The finding of the judge in the present case was for a less amount than the contract price, although there was the testimony of the plaintiff that he did not think he could have secured employment if he had tried. There was evidence tending to show that during a part of the time at least covered by the contract he was engaged in preliminary preparations for establishing a business on his own account. From these circumstances, as well as from the plaintiff's own manner in testifying and other inferences, which the trial judge drew from the appearance of the witness, he might have been satisfied that prompt, reasonable and *bona fide* efforts to obtain other employment would have been

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successful, or that by the use of his time for his own advantage in his private business he would have gained such value as to reduce materially the amount, which he might otherwise recover from the defendant. *Alaska Fish & Lumber Co.* v. *Chase*, 128 Fed. Rep. 886. The judge was not precluded from using his own knowledge of practical affairs or applying his judicial sense to the consideration of a matter of such common occurrence as securing employment. If opinion evidence had been introduced, the judge would have used it or not as he found it credible and helpful. He might well have been guided quite as much by his judgment of the value of the plaintiff's services, based upon his appearance, the character of work he had done and was competent to do, and the wages he had received. It is the same problem, which courts and juries often solve in passing upon the extent of personal injury, and in determining how long disability may continue, and how soon and at what compensation employment may be found. They are frequently compelled to act upon evidence as slender as that in the present case. That it is difficult to ascertain the damages or that they depend upon events which are contingent, uncertain or matter of opinion is no sound objection to the recovery. *The Mediana*, [1900] A. C. 113. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 199 Mass. 220. Therefore, on this branch of the case also the finding of the judge is not wholly unsupported.

Exceptions overruled.

EDWIN L. BROOKS, administrator, *vs.* FITCHBURG AND LEOMINSTER STREET RAILWAY COMPANY.

Worcester. September 29, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Causing death, Gross, Street railway. *Street Railway*. *Statute*, Repeal, Construction.

Review by RUGG, J., of legislation in this Commonwealth giving a remedy for death caused by the negligence of persons or corporations or the unfitness or negligence of their agents or servants.

Statutes, which are alleged to be inconsistent with each other in whole or in part,

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must be construed so as to give reasonable effect to all, unless some positive repugnancy appears.

R. L. c. 171, § 2, as amended by St. 1907, c. 375, giving a remedy for a death caused by the negligence of a person or corporation or the agents or servants thereof, does not apply to a death caused by the negligence of a street railway corporation or its agents or servants, the remedy for such a death given by St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392, being exclusive.

TORT by the administrator of one who, while a passenger of the defendant, received injuries which resulted in his death. Writ in the Superior Court for the county of Worcester dated March 17, 1908.

The declaration alleged that on September 24, 1906, at the request of the defendant, Ellen E. Brooks, the plaintiff's intestate, boarded a car of the defendant in Fitchburg and became a passenger on said car, "and thereupon it became the duty of the defendant to convey the said Ellen E. Brooks safely on said car; yet the defendant, not regarding its duty in that behalf, wholly neglected so to do, and by its agents and servants so negligently, carelessly and unskilfully managed said car, that the said Ellen E. Brooks, while in the act of boarding said car, by reason of said negligent and careless and unskilful management of said car by said defendant, its agents and servants, received injuries which resulted in her death on June 7, 1907; that said Ellen E. Brooks was at all times in the exercise of due care and diligence and was not in the employment or service of the defendant. That this action is brought under chapter 375, of the acts of 1907."

The defendant demurred on the following grounds:

"(1) The declaration purports to be against a street railway company under St. 1907, c. 375, and states no cause of action for the reason that said statute does not apply to street railway companies.

"(2) The injury alleged as a cause of action in plaintiff's declaration occurred prior to the passage of said statute and does not fall within its provisions.

"(3) The injury set forth in plaintiff's declaration is alleged to have occurred prior to the passage of said statute; hence so much of said statute as by amendment strikes out the word 'gross' from the statute amended cannot apply to injuries which occurred prior to the passage of said statute; and there

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is no allegation in said declaration that the negligence of the agents or servants which caused said injury was 'gross' negligence.

"(4) Plaintiff's action was not commenced within one year of the alleged injury."

After a hearing before *Richardson*, J., the demurrer was sustained, judgment was ordered for the defendant and the plaintiff appealed.

J. E. McConnell, (*J. H. P. Dyer* with him,) for the plaintiff.

E. W. Baker, (*C. F. Baker* with him,) for the defendant.

RUGG, J. The plaintiff's declaration alleges that his intestate, while a passenger upon the defendant street railway, received an injury on September 24, 1906, by reason of the negligence of the defendant's servants, from which she died on June 7, 1907, being survived by husband and children, and that the action is brought under statute 1907, c. 375, the writ being dated February 17, 1908. The question presented is whether this statute,* approved May 4, 1907, renders a street railway company liable in damages for death caused by the negligence of itself or its servants. It is contended, on the one side, that its language is plain and comprehensive and in its terms broad enough to include street railway companies, and on the other, that, taking into perspective all our statutes authorizing recovery for death caused by negligence and giving to each its proper scope and construing them all so as to constitute an har-

* St. 1907, c. 375, is entitled "An Act relative to the recovery of damages for death caused by the negligence of persons or corporations, or of the agents or servants thereof." Section 2 provided that the act should take effect upon its passage. Section 1 amended R. L. c. 171, § 2, to read as follows: "If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow: or, if there is no widow, the whole to the use of the next of kin."

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monious legal system, it was not the intent of the Legislature to include street railway companies within this act, but that damages for such a misfortune as is here set forth can be recovered only under St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392,* approved May 8, 1907. Substantially this inquiry was left open in *Beale* v. *Old Colony Street Railway Co.* 196 Mass. 119, and, while adverted to in *Oulighan* v. *Butler*, 189 Mass. 287, 295, in *Kelsey* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 64, and in *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, was not decided.

In determining this question, the origin and subsequent history

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* St. 1907, c. 392, is entitled "An Act to increase the penalty imposed on a railroad or street railway corporation for loss of life through its negligence." Section 2 provided "This act shall not affect any suit or proceeding now pending, or any cause of action or ground of indictment existing prior to the passage of this act." Section 1 amended St. 1906, c. 463, Part I. § 63, to read as follows: "If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars which shall be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one half thereof to the use of the widow and one half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or if there is no widow, the whole to the next of kin; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the sum of not less than five hundred nor more than five thousand dollars, in the same manner as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section."

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of the several statutes are important. It is elemental in this Commonwealth that at common law there was no recovery for negligence causing loss of life. Our earliest statute, providing damages for death, was passed more than two hundred years ago, and related to death caused by defects in highways. 1 Prov. Laws (State ed.) 136. Its substance is now found in R. L. c. 51, § 17, and has continuously been a part of our statute law ever since its first enactment. It was the only statute of the kind until St. 1840, c. 80, was passed, which gave a remedy by indictment against all common carriers for causing, by their own negligence or the unfitness or gross carelessness of their employees, the loss of life of a passenger, whether in the exercise of due care or not. By St. 1853, c. 414, railroad corporations were made liable to indictment for causing under similar conditions the loss of life of any person in the exercise of due care, not a passenger or employee, thus extending liability against railroads alone beyond that established in 1840 for all common carriers. The ground of liability and the measure of recovery were the same in both statutes. When the laws of the Commonwealth were consolidated in the General Statutes, a chapter was devoted to railroad corporations, and by two sections the pre-existing liability of railroads for loss of life was continued: c. 63, § 97, continued that imposed by St. 1840, c. 80, and § 98 that created by St. 1853, c. 414. The liability for loss of life of a passenger by other common carriers was re-enacted in c. 160, § 34. The ground of liability in both cases was the same, namely, the negligence or carelessness of the defendant itself or the unfitness or gross negligence or carelessness of its servants or agents. St. 1864, c. 229, was the first general law respecting street railways. By § 37 it was provided that if, by reason of the negligence of the company or the unfitness, negligence or carelessness of its servants, the life of any person, whether passenger or not, in the exercise of due care, and not in the employ of the company, was lost, there should be a remedy by indictment. This section differed in important particulars from the preceding statutes. It imposed liability for the mere negligence of its servants and agents, while railroads and other common carriers were liable only for the gross negligence of their servants or agents. Street railways were made liable also

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for the death of persons other than passengers who were not its employees, being in this respect upon the same footing as railroads, and having a severer liability than other common carriers, but, on the other hand, all persons, whether passengers or not, were required to be in the exercise of due care as a prerequisite to the liability, in this respect the burden as to passengers being less severe than that upon railroads or other common carriers. The next general codification of the street railway laws was St. 1871, c. 381, § 49 of which continued this same liability of street railway companies. In 1874, by c. 372 of the acts of that year, the general laws relating to railroads were consolidated and re-enacted, and by § 163 the liability of railroads in this regard was continued upon the same basis as that theretofore existing. By St. 1881, c. 199, the important change was made in the law as to loss of life occasioned by railroad companies and "proprietors of any steamboat or stage coach, or of common carriers of passengers," and for the life of a person lost by a defective highway, in that a new remedy, namely, an action of tort, was given for the benefit of the widow and near kindred of the person deceased. Section 6 of this act preserved as concurrent the remedy by indictment existing against railroads by St. 1874, c. 372, §§ 163, 164, but made no corresponding preservation of remedy against other common carriers or municipalities. This act did not include street railways by name. When the Public Statutes were enacted, the liability to indictment disappeared against all except railroads and street railways. The Public Statutes made important changes in the laws theretofore existing, in that it combined the remedy by indictment against both steam railroads and street railways in a single section, and excluded the latter from liability for ordinary negligence of their servants and agents, and placed them on the more restricted ground, upon which railroads and other common carriers had always stood, of liability only for gross negligence of servants and agents. It also placed the street railways upon a more favorable footing than before, in that persons not passengers were required to be in the exercise of due diligence before liability for their death arose. Pub. Sts. c. 112, § 212. But this section did not by express phrase give the remedy by action of tort against street railways. Pub. Sts. c. 73, § 6, continued the liability of "the proprietor or proprietors of a

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steamboat or stage coach, or of common carriers of passengers," subjecting them only to an action of tort for loss of life of passengers, but upon the same conditions as before. Upon this state of legislation it was held, in *Holland* v. *Lynn & Boston Railroad*, 144 Mass. 425, without adverting to the distinctions in the statutes just pointed out between liability for gross and ordinary negligence nor the differences as to due care being a prerequisite to recovery, that street railway companies were not included within the purview of Pub. Sts. c. 73, § 6, rendering "common carriers" liable to an action of tort, for the reason that the conclusion was irresistible that it was not the intent of the Legislature by that enactment to include such companies. St. 1883, c. 243, imposed upon the railroads liability for the death of an employee occurring under such circumstances as would have entitled the deceased to maintain an action against the corporation if death had not resulted, under the same conditions and with the same remedies as if the deceased had not been an employee. The remedy by an action of tort, which had, by St. 1881, c. 199, been given, where there was liability for death, against steam railroads and other common carriers, was extended to street railway companies by St. 1886, c. 140, thus supplying the omission pointed out in *Holland* v. *Lynn & Boston Railroad*, 144 Mass. 425.

In 1871 by c. 352 of the acts of that year it was enacted that a railroad should be liable to indictment as provided by Gen. Sts. c. 63, § 98, for causing death by collision with its engines or cars at a grade crossing where sounding of a whistle or ringing of a bell was required and these signals were not given, unless the deceased, or those responsible for him, in addition to the want of ordinary care, was also guilty of gross or wilful negligence or acting in violation of the law and these contributed to the death. This relieved a plaintiff in one respect from a burden of proof, and imposed a heavy burden of proof upon the railroad as an affirmative defense. *Commonwealth* v. *Boston & Maine Railroad*, 133 Mass. 383. *Manley* v. *Boston & Maine Railroad*, 159 Mass. 493. *McDonald* v. *New York Central & Hudson River Railroad*, 186 Mass. 474. This provision has been retained without very material change, except that an action of tort has been also given, until the present time.

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St. 1874, c. 372, § 164. St. 1881, c. 199, § 2. Pub. Sts. c. 112, § 213. R. L. c. 111, § 268. St. 1906, c. 463, Part II. § 245.

It is not necessary to trace the history of employers' liability, St. 1887, c. 270, because it imposes liability upon all employers of labor (with certain exceptions), and contains, so far as this inquiry is concerned, no distinctions between different kinds of employers, and as to street railway companies does not furnish a remedy upon the same ground as St. 1907, c. 375 or c. 392.

The next change of importance was by St. 1897, c. 416, which subjected corporations operating gas or electric light plants or systems to an action of tort, where the life of a person, exercising due diligence and not an employee, was lost by the negligence of the corporation or the unfitness or gross negligence of its servants or agents, but this statute did not confer the remedy by indictment.

St. 1898, c. 565, provided an action of tort against any person or corporation whose negligence or the gross negligence of whose servants or agents caused the loss of life of a person, other than an employee, in the exercise of due care. This is the precursor of the statute under which the plaintiff claims, and is the first statute of the kind, which omits unfitness of the servant or agent as a ground of liability. This statute would not ordinarily be construed as a repeal of existing statutes, as to common carriers of all kinds, because they might be liable for the death of a passenger, not in the exercise of due care. The statutes being remedial, it cannot be inferred that a repeal was intended by the enactment of a new statute imposing a more onerous burden of proof upon a plaintiff, without much clearer manifestation of legislative will than this statute shows. But the legislative intent can be best ascertained from its action in the compilation of the Revised Laws, where these two statutes were combined in c. 171, § 2, and the liability was based upon the negligence of the person or corporation causing the death or the gross negligence of its servants or agents, omitting again, as an express ground, unfitness of servants. The liability of railroads and street railways for causing the death of any person was included in a single section, R. L. c. 111, § 267, in substantially the same language as that before used. See also § 268. The liability of other com-

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mon carriers was re-enacted in R. L. c. 70, § 6. The liability of municipalities for death caused by defects in highways was continued by R. L. c. 51, § 17. The employers' liability act, giving an action for causing the death of an employee, is found in R. L. c. 106, §§ 72–75.

In this state of the statute law it is plain, from the origin and history of the various acts of legislation and their collocation in this compilation, that five different classes of liability are established: first, liability for the death of employees; second, that of municipalities for death occurring by defects upon highways; third, that of railroads and street railways for causing the death of passengers and persons other than passengers, not employees, in the exercise of due care, except in the case of railroads causing death at a grade crossing where the statutory signals have been omitted, when the burden of proving the gross negligence of the deceased rests on the railroad, and of railroads, alone, for causing the death of employees, who, if not killed, might have recovered damages; fourth, that of other common carriers for the death of passengers only; and, fifth, that against all other persons and corporations for causing the death of others than employees. The three last classes were not intended to exist as concurrent remedies, giving an election between them to the persons entitled to maintain them, because there were important differences in the liability imposed by the several statutes. It is unlikely that the Legislature would by express enactment impose different civil liabilities for the same act for the benefit of the same persons. The railroad and street railway and other common carriers were liable for death occasioned by the unfitness of their employees, while the last mentioned class of persons was not, by the express phrase of the statute, made so liable. Whether this makes a substantial difference in the rights of the parties may be open to inquiry when the proper occasion arises. Railroads, street railways and other common carriers were liable for the death of a passenger, even if such passenger was not in the exercise of due care, while in the last class due care on the part of the person deceased was a condition precedent to recovery. Again, the remedy for indictment was provided against railroads and street railways, while only the action of tort exists against the other persons liable. And,

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finally, an employee of the railroad was in some respects placed on the same footing as a stranger to the employment, not a passenger. In important particulars, therefore, the liability of steam railroads and street railways is greater than that provided against other defendants.

In the light of this situation we proceed to examine the subsequent legislation. The general railroad law was revised and re-enacted by St. 1906, c. 463, of which Part I. § 63 is almost identical with R. L. c. 111, § 267. St. 1907, c. 392, amended St. 1906, c. 463, Part I. § 63, by increasing the maximum of liability in case of death of a person other than an employee from $5,000 to $10,000, and by striking out the word "gross" before "negligence." St. 1907, c. 375, under which the plaintiff claims to recover, is an amendment of R. L. c. 171, § 2. It makes a similar increase of maximum liability and change in the degree of negligence of employees, for which a defendant may be liable. In effect both of these amending statutes are the same as if they had been originally enacted in the Revised Laws in the form in which they now appear. *Bartley* v. *Boston & Northern Street Railway*, 198 Mass. 163. Therefore, the same rules of construction are applicable as if both statutes were enacted at the same time and as a part of the same general statutory scheme. The liability of common carriers other than railroads and street railways established by R. L. c. 70, § 6, has been unchanged. The principle of interpretation is well established, that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them. *United States* v. *Lee Yen Tai*, 185 U. S. 213. *Pollock* v. *Lands Improvement Co.* 37 Ch. D. 661. *Thorpe* v. *Adams*, L. R. 6 C. P. 125. *Hill* v. *Hall*, 1 Ex. D. 411. *Copeland* v. *Springfield*, 166 Mass. 498. *Brown* v. *Lowell*, 8 Met. 172.

This review of the statutes demonstrates that the Legislature has always, in the respects now under consideration, treated railroads and street railways as separate classes of corporations, not always upon the same basis, and has generally held them to a higher degree of liability than other persons or corporations. This legislative policy continues in the statutes as they

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now exist, save only as to the limitation of the time within which action may be brought. It cannot be assumed, as before pointed out, that the statute upon which the plaintiff relies repealed by implication (for there is no express repeal) R. L. c. 70, § 6, and St. 1906, c. 463, Part I. § 63. Such an assumption would be especially violent in view of St. 1907, § 392, passed four days later than the one under which the plaintiff claims, which reaffirmed with increased liability the remedies against railroads and street railways. There is room for a reasonable application and ample field for the operation of St. 1907, c. 375, by treating it purely as a remedial statute, and applicable to other persons and corporations not subjected by existing statutes to any like liability, although, in view of the statutes respecting liabilities of cities and towns for death occasioned by defects in highways, and *Linehan* v. *Cambridge*, 109 Mass. 212, it may be doubtful whether it was intended to apply to municipalities.

The conclusion we have reached gains strong support from the fact that these several provisions are all enacted in a general compilation of the body of statute law of the Commonwealth, which was first made by a commission of three learned lawyers, after a labor of about five years, whose report shows no indication of a thought of inconsistency or duplication of remedies, and was subjected to prolonged examination by a joint special committee of the General Court sitting after the close of the regular session, Resolves of 1901, c. 111, and from the further fact that both the railroad and street railway statute and the general death liability statute were re-enacted in a new form, as before pointed out, by the Legislature of 1907. Arguments which might have plausibility touching detached statutes, passed at different sessions of the Legislature, have no force as to such a body of law. It is inconceivable that these divers provisions for differing grades of liability could exist without deliberate intention. The view we take upon this question renders it unnecessary to discuss the other defense raised.

Judgment affirmed.

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ELI C. BEERS *vs.* ISAAC PROUTY COMPANY.

Worcester. September 29, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action of tort for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, by reason of the incompetence of a workman furnished by the defendant to work with him, there was evidence tending to show that it was the plaintiff's duty to act as the superior one of two workmen in the operation of a large and complicated machine, that occasionally the machine would have to be stopped because of becoming clogged, when both he and his fellow workman would have to clean it out, and that it frequently was necessary for him to give directions to the fellow workman; that, half an hour before the accident occurred, the alleged incompetent fellow workman was sent by the defendant to work with the plaintiff, that he could speak only French, while the plaintiff could speak only English, and that the plaintiff did not know that the fellow workman could not speak English; that the machine, becoming clogged, was stopped and the plaintiff and the fellow workman were at work cleaning it out, when the fellow workman started it up a little and the plaintiff's fingers became caught, that the plaintiff thereupon in English directed the fellow workman to turn off the power, but, instead, he turned it on, and the plaintiff lost his fingers; that, if the power had been turned off, the plaintiff could have extricated his fingers without injury. *Held*, that there was evidence warranting findings that, because he could not speak English, the fellow workman was incompetent for the work to which the defendant assigned him; that the defendant knew he could not speak English; that the plaintiff's injury resulted from such incompetence, and therefore that the defendant was liable.

TORT for personal injuries received by the plaintiff, while in the defendant's employ, by reason of his fingers being caught in a machine alleged to have been started negligently by an incompetent fellow servant. Writ in the Superior Court for the county of Worcester dated March 27, 1907.

There was a trial before *King*, J. The material facts are stated in the opinion.

At the close of the evidence, the plaintiff requested the following rulings: "(1) The fact that a fellow servant sent to work with another fellow servant upon a machine, in the natural and proper operation of which the labor of two men is required at the same time, and in the natural and proper operation of which it is necessary for the two men to talk with each other, cannot

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speak or understand the language spoken by the other fellow servant, is some evidence of incompetency on the part of the fellow servant so sent. (2) If a fellow servant of the plaintiff is so inexperienced or so uninstructed that in working under the circumstances set forth in the first request he is not fit for the position, and he mismanages the machine in use by them so as to cause an injury to the plaintiff, this is some evidence of incompetency, and, other necessary elements being present, plaintiff may recover."

The presiding judge refused to make the rulings requested, but did rule, at the request of the defendant, "If the jury finds that St. Hillaire was competent to operate this machine, and knew the operations of the various levers, the plaintiff cannot recover"; and "the mere fact that St. Hillaire did not speak English, did not make him incompetent within the meaning of the law."

The jury found for the defendant; and the plaintiff alleged exceptions.

M. M. Taylor, for the plaintiff.

C. C. Milton, for the defendant.

RUGG, J. The plaintiff was at work, as an employee of the defendant, upon a somewhat complicated machine for the manufacture of paper or pasteboard boxes. In its ordinary and economical operation the labor of two men was required. A common occurrence was for the paper or pasteboard to clog in process of manufacture, rendering it necessary to stop the machine and clean off the paper and paste, which had stuck to it. The work of the plaintiff was "feeder," and he was the superior of the two men and in authority in running the machine. The other person working upon the machine was called "catcher." It was the ordinary course of employment for both men to work in cleaning when necessary. The plaintiff had been at work upon the machine for several weeks. About half an hour before the accident occurred, one St. Hillaire was for the first time sent by the boss of the defendant to work upon the machine as catcher. The plaintiff knew St. Hillaire only casually, and was not aware of the fact that he could not speak or understand the English language. After they had thus been at work together less than an hour, the machine, having become clogged with the

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pasteboard and paste, was stopped by St. Hillaire, and both men began cleaning. Then St. Hillaire started the machine a bit, whereby the plaintiff's fingers were caught just hard enough so that they could not be pulled out, although "it was not exactly painful as they were held there." Thereafter the plaintiff in English, which was the only language he knew, directed St. Hillaire to put off the power.* Instead of following this direction, St. Hillaire started the power up, and the plaintiff's fingers were cut off. It might have been inferred that it was necessary, in the natural and proper operation of the machine, for the two men at work upon it to communicate with each other through the medium of speech. The question raised is whether, under these circumstances, the defendant might have been found to have furnished an incompetent fellow servant from the fact that it put a man at work on the machine who could not speak the English language, or the language of the man in charge of the machine. The charge of the trial judge must have left the clear impression upon the minds of the jury that mere inability to speak the English language on the part of St. Hillaire could not be found to be sufficient evidence of incompetency.

The duty of the employer is to exercise ordinary prudence in the selection of his servants, in order to ascertain that they are competent to perform the work to which they are to be assigned. If he employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, then he is liable to any other employee, himself in the exercise of due care, who receives injury as a proximate result of some act of the incompetent servant growing out of his want of capacity. The employee has a right to rely upon the assumption that in this respect the master will perform his duty, and that the fellow servants employed to work with him will not be lacking in the possession of those usual attributes, which would make them ordinarily safe co-workers. He may with propriety act on the theory that

* The plaintiff testified, "If at the time my fingers were caught as I have stated, and before they were cut off, the power had been thrown off by this belt on the side of the machine you can back the machine up, that is, lower the block down, you could do this by pulling on that belt with your hands so as to reverse it, that would loosen it enough to let my fingers out."

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he will in the performance of his own duties be free from the danger of want of capacity in his fellow laborers to perform their duties.

What constitutes incompetency of an employee varies with the nature of the duties he is called upon to perform, and their relation to other human beings. Where mere manual labor is required, and there is no occasion for the exercise of discretion and no expectation of co-operation with other laborers, it may be that servants of divers tongues may with propriety be put to work in the same company. Color blindness or extraordinary nearsightedness might render one incompetent to act as a locomotive engineer, while these same deficiencies might not impair the usefulness of a watchmaker. Deafness might make one useless as a telegraph operator or on a telephone exchange, but be no serious difficulty in a boiler maker. Ignorance respecting the duties one is called upon to perform would generally be incapacity. It is of no consequence whether that ignorance consists in a want of knowledge of mechanical processes or linguistic acquirements, provided the knowledge of the subject-matter is essential in the performance of the required duty. Ignorance of the English language in an experimental chemist working by himself for a steel manufacturer might not render him incompetent, but it could not be contended that one unfamiliar with that language would be a suitable teacher for the public schools.

The plaintiff was the superior artisan, and had been at work upon the machine which caused his injury for a considerable period of time. He had a right to assume that the defendant would not send an incompetent workman to assist him. From the photograph used in argument and the description given by witnesses, it is apparent that the box machine, upon which these two men were at work, was of considerable size, complicated in its design and intricate in its mechanism. In its ordinary use, frequent stopping, cleaning and starting were necessary, and co-operation between the workmen was required. There was evidence sufficient to justify a conclusion by the jury that it was necessary for the plaintiff to give directions by word of mouth from time to time to the catcher. Under these circumstances the jury should have been permitted to find

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that the placing a man upon this machine, who was unable by reason of ignorance of the English language to understand and act upon directions received from the plaintiff, was in and of itself sufficient evidence of the employment of an incompetent servant. It was as if a man absolutely deaf had been sent. This want of knowledge resulting in an inability to obey orders was as much incompetency as nervousness or lack of judgment on the part of a stationary engineer, *Olsen* v. *Andrews*, 168 Mass. 261, or weakness, infirmity and excitability in an elevator man, *Ledwidge* v. *Hathaway*, 170 Mass. 348.

Nor can it be said that the plaintiff was not injured by this error. It is not open to argument that the defendant did not, or might not in the exercise of reasonable care, know of the inability of St. Hillaire to speak the English language, and that English was the vernacular of the plaintiff. The very act of hiring must have furnished this information. There was also ground for the view that the plaintiff's injury resulted directly from the inability of St. Hillaire to understand his orders. St. Hillaire was the one whose position for work at the machine made him naturally the one to put the power on and off. His posture was not such as to give him necessarily the knowledge that the plaintiff's fingers were caught, and he testified that he did not know they were caught, until he saw they were cut off. That he threw the power on instead of off may have been found to be the direct result of his inability to understand the direction given him in English by the plaintiff.

Exceptions sustained.

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HARRY W. PINKERTON *vs.* INHABITANTS OF RANDOLPH & others.

Norfolk. March 19, 20, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Trespass. Damages. Way. Boundary. Deed. Municipal Corporations. Joint Tortfeasors.

The owner of land abutting on a private way, who also owns the fee of the land to the centre of the way and maintains trees and shrubbery on the part of the way of which he owns the fee, although his right to maintain them there is subject to the right of the other abutters on the way to have them removed as obstructing their right of passage, is entitled to damages against a trespasser who removes the trees and shrubbery for interference with his qualified right. The trespasser can show in reduction of damages that the right which he invaded was a qualified and not an absolute one, but, if the removal of the trees and shrubs diminished the value of his property, the landowner is entitled to more than nominal damages, and in estimating his damages it is proper to consider whether and to what extent the other abutters would be likely to insist upon their right of way under the circumstances shown.

A boundary line described in a deed as running in a certain direction by a private way includes the fee of the land to the centre of the private way, if it belongs to the grantor, unless the deed by explicit statement or necessary implication requires a different construction, and the fact that the monument at one end of the boundary on the way is stated to be in the line of the way does not require a different construction.

A town is not liable for acts of trespass committed by the persons who are its selectmen and the persons who are its water commissioners in attempting to construct a street and to dig a trench for a water main in a private way which the town had undertaken to lay out as a public street by a vote which was illegal and void.

If the persons who are the selectmen of a town commit acts of trespass on the land of a private person under the supposed authority of a vote of the town which is illegal and void, they are liable to the landowner for the damage caused to his property, and, being joint trespassers, each of them is liable for the whole damage. The same rule is applicable to similar acts committed without authority by the persons who are the water commissioners of a town.

BILL IN EQUITY, filed in the Superior Court on September 14, 1906, against the town of Randolph and against the persons acting as selectmen and the persons acting as water commissioners of that town, to restrain the defendants from entering certain land of the plaintiff on Wales Avenue, a private way in Randolph leading from North Main Street to Cross Street in that town, or from crossing such land of the plaintiff or digging a

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trench therein, and for the assessment of damages for acts of trespass alleged to have been committed by the defendants in taking and destroying many trees, shrubs and fences, disturbing the soil and doing other illegal acts, and for an order that the defendants pay to the plaintiff the amount of the damages so assessed.

In the Superior Court the case was referred to Charles F. Perkins, Esquire, as master. He filed a report, to which the defendants filed objections and exceptions founded thereon. The case was heard by *Fox*, J., upon the defendants' exceptions to the master's report. He made a final decree that the defendant town and the defendants constituting the selectmen of the town were jointly liable to the plaintiff in the sum of $414.40, made up of $350 damages and $64.40 for interest from January 1, 1905, to January 25, 1908, and that the plaintiff should recover his taxable costs against these defendants; also that the defendants constituting the board of water commissioners of the town were jointly liable to the plaintiff in the sum of $5 for damages done to the plaintiff's land. The defendants appealed from the decree.

J. V. Beal, for the defendants.

W. W. Hart, for the plaintiff.

HAMMOND, J. This case is before us upon an appeal taken by the defendants from a final decree overruling their exceptions to the report of the master, and allowing damages against the defendants as found by him. Although one of the purposes of the bill was to obtain an injunction against future trespasses, it now appears from the record that since the bill was filed Wales Avenue has been legally laid out; and hence the only question before us respects the matter of damages suffered by the plaintiff before the filing of the bill, and the extent to which any of the defendants are answerable.

The question whether the master was right in ruling that, for the acts committed by the water commissioners under the vote of the town passed in 1906, directing the commissioners to extend the water main in Wales Avenue to Cross Street and providing for the issue of the notes of the town to the amount of $2,000 to defray the expense, neither the town nor the commissioners were answerable to the plaintiff, is not raised by the

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defendants' exceptions; and therefore we do not pass upon that matter.

It appears from the report that at the hearing before the master the defendants contended "that the plaintiff suffered no damage from the destruction of the trees for the reason that they stood within the limits of the private way, and that the plaintiff had no permanent right to maintain them there, as the users of the private way had the right to remove them at any time." The master ruled that the defendants being trespassers this defense was not open to them, and that the plaintiff was entitled to recover damages as though he had a permanent right to maintain the trees in the avenue.

In this the master was wrong. Even if the defendants were trespassers, they were entitled to show, as bearing upon the question of damages, the nature of the plaintiff's right which had been invaded. They could do this, not for the purpose of justifying the trespass, but as throwing light upon what thing the plaintiff had lost and the consequent amount of the loss.

The ruling of the master that the plaintiff owned to the centre of the avenue was correct. There can be no doubt that by the express language of the deed from Upham and another, dated February 22, 1900, conveying to the plaintiff the westerly lot now owned by him, the fee in the northerly half of that part of Wales Avenue adjoining the lot was included in the description; it was a strip of land twenty feet wide and two hundred and thirty-eight feet long, "more or less." The language of the deed conveying to the plaintiff the easterly lot is not however so clear. The first boundary line * runs "westerly by said avenue," and must be construed to be the centre line of the avenue unless the deed by explicit statement or necessary implication requires a different construction; *Peck* v. *Denniston*, 121 Mass. 17, 18; and the fact that the monument at one end of the street boundary is stated to be in the line of the street is not now regarded as necessarily requiring such different construction. Such a case ordinarily presents a contradiction of monu-

* The part of the description referred to was as follows: "Beginning at the southeasterly corner of said parcel at a point on the northerly line of said avenue three hundred and fifty-three feet west from said Main Street; thence running westerly by said avenue one hundred and fifty feet."

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ments or boundaries, and the general rule must prevail. *Everett* v. *Fall River*, 189 Mass. 513. The present case cannot be distinguished in principle from that case and must stand with it. That case must be regarded also as directly overruling *Sibley* v. *Holden*, 10 Pick. 249. See also *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 492, and *McKenzie* v. *Gleason*, 184 Mass. 452. The deed of the easterly lot, therefore, conveyed to the centre of the avenue.

But even if the plaintiff owned to the centre of the avenue, it is clear from the facts appearing in the report that the abutters thereon had a right of way over its whole length and breadth. It follows that the plaintiff had no permanent right to maintain the trees and shrubbery upon the part of the avenue of which he was seised in fee. His right to maintain them was subject to the right of the abutters to have them removed.

The master found that as the result of constructing the new street illegally laid out, the market value of the plaintiff's premises was diminished to the amount of $350. But he further found that "if the court should rule that the defendants could avail themselves of the fact that the plaintiff had not a permanent right to maintain the trees and shrubbery on said right of way, the damages which the plaintiff would be entitled to recover would be very materially reduced and difficult to estimate, and I should be unable to find, upon the evidence before me, that the plaintiff was entitled to more than nominal damages." It thus appears by the terms of the report that the damages were assessed upon a wrong basis, and that the final decree is wrong in allowing the plaintiff $350 damages and interest on account of the construction of the street.

But while the plaintiff has no permanent right as against the abutters to have the trees and shrubbery remain upon the avenue in front of his lots and owned by him in fee, still his right is subject only to this right of the abutters; and in estimating the damages suffered by him on account of the interference by strangers with this qualified right, it is proper to consider whether and to what extent the abutters would insist upon their right of way and what are the reasonable probabilities in this direction under the circumstances.

It is manifest that this view of the plaintiff's qualified right

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was not considered by the master, and that if only nominal damages be allowed the plaintiff injustice might be done to him. We think, therefore, that the case should be recommitted to the master to ascertain the damages suffered by reason of this interference with this qualified right as to the trees and shrubbery upon that part of the avenue owned by him.

But the town cannot be held for this damage. The trespass of which the plaintiff complains consists of the entry upon his land and the acts done thereon. It is manifest that the act of passing the vote was not a trespass. The vote was illegal.* The town was under no legal obligation and had no power to spend money in the manner contemplated by this vote. The vote being void, the inhabitants of the town in their corporate capacity are not answerable. *Morrison* v. *Lawrence*, 98 Mass. 219. *Lemon* v. *Newton*, 134 Mass. 476. *Cavanagh* v. *Boston*, 139 Mass. 426. *Cushing* v. *Bedford*, 125 Mass. 526.

The persons, however, who committed or caused the damage are individually liable because they acted without any lawful authority, and that is so even if they were selectmen. *Moynihan* v. *Todd*, 188 Mass. 301, and cases cited. Being joint trespassers they are each liable for the whole damage. The same rule is applicable to the water commissioners.

We have considered the defendants' exceptions which were not argued in their brief as waived. From what has been said it follows that as to the exceptions argued, those relating to the liability of the town and to the question of the amount of damages recoverable for the acts done in constructing the way are sustained, and the others are overruled.

The case must be recommitted to the master for the assessment of the damages upon this part of the case, and the appeal

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* At a town meeting on August 15, 1904, the following vote was passed: "Voted, unanimously, That we accept the locating and laying out of the proposed new street from North Main Street to Cross Street as laid out by the selectmen; that the selectmen be and they are hereby authorized and directed to build the same." The laying out of the street was illegal because the selectmen failed to file a plan as required by R. L. c. 48, § 71. At a town meeting held on May 31, 1906, the town directed the water commissioners to extend a water main from a point on Wales Street to Cross Street.

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from the final decree upon this item and upon the liability of the town is sustained. In every other respect the decree is to stand.

So ordered.

JOHN DUNLEAVY *vs.* MAURICE F. SULLIVAN & another.

Hampden. September 22, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action of tort against two partners, C. and S., for personal injuries received by the plaintiff while in the defendants' employ through the falling of a temporary staging alleged to have been caused by defective material from which it was made, it appeared that the work upon which the plaintiff was engaged when injured was the putting of new metal sheathing on the outside of a building. There was evidence tending to show that, in the construction of the stagings upon which the plaintiff worked, two blocks of a size two feet by three feet were used by being nailed to the building, and that there were no other blocks in use on the work; that the work reached a point where the staging which was being used was inadequate, and that, at about noon, the plaintiff and his fellow workman told the defendant C. that a swinging stage was necessary, that the defendant C. told the defendant S. to get such a stage for the workmen, that the defendants did not own such a stage, but that the defendant S. went with the plaintiff and his fellow workman to the building where the work was being done, to "see what we can do," and the plaintiff's fellow workman suggested a device which required that two blocks should be nailed to the building upon which should rest the ends of cross pieces which, in turn, should support a ladder for the plaintiff to work upon, that S. assented to the arrangement and departed, that the plaintiff and his fellow workman thereafter constructed the stage as planned, using both of the blocks above referred to, which already had been nailed and renailed to the building six times, and which on this occasion the plaintiff and his fellow workman nailed vertically to the building, so that the cross pieces supporting the ladder upon which they stood rested upon the ends of the blocks, and that, while they were standing on the staging at work about four hours later, it fell because one of the blocks split lengthwise. The presiding judge refused to direct a verdict for the defendants, and they excepted. *Held*, that the exception must be overruled, since it was the defendants' duty to furnish proper materials for the staging, and there was evidence which would warrant a finding that the defendants authorized the use of the block which broke, that the block was unsuitable and, if it had been properly inspected, would have been discovered to be so.

TORT for personal injuries received by the plaintiff because of the giving way of a staging on which the plaintiff was at work for the defendants. Writ in the Superior Court for the county of Hampden dated August 16, 1907.

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There was a trial before *Wait*, J., and a verdict for the plaintiff. The defendants alleged exceptions.

The facts are stated in the opinion.

C. T. Callahan, for the defendants.

W. H. McClintock, for the plaintiff.

LORING, J. This is an action for personal injuries caused by the giving way of a staging on which the plaintiff was at work. The plaintiff was a servant of the defendants, employed in putting new metal sheathing on the outside of a building known as the Russell building, on Suffolk Street in Holyoke. This building was thirty feet high in front, that is, on Suffolk Street, with a roof sloping down toward the back; at the back it was twenty-one to twenty-three feet high. There was a conflict as to the depth of the building, the plaintiff testifying that it was thirty, and one of the defendants that it was ninety, feet deep.

Next to the Russell building was a low wooden shed, also facing on Suffolk Street, which extended back about the same length as the Russell building. This shed was from twelve to eighteen feet high in front. Its roof also sloped down toward the back, and at the back it was a foot lower than at the front. There was some evidence that there was an addition in the rear which was eight feet higher. But that is not material.

The space between the Russell building and this shed was put by the plaintiff at eighteen inches, and by one of the defendants at twenty-one inches.

The work which the defendants had undertaken to do consisted in stripping off old and putting new metal sheathing on the outside of the Russell building. This metal sheathing came in pieces four feet long and two feet four inches wide.

The plaintiff testified in his own behalf, and called as a witness one Bramham, who was still in the defendants' employ.

The story told by Bramham was that while stripping off the old and putting on the new metal sheathing between the two buildings below the roof of the shed, the defendants' workmen had constructed for themselves a staging of the following description: Two sets of cleats were nailed to each building. On these sets of cleats cross pieces were laid. On these two sets of cross pieces a twelve foot ladder was placed, and on the ladder boards were laid, on which the men stood while at their work.

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While working between the buildings, seven eighths boards had been used as cleats, but, when the work progressed to the point where a staging above the roof of the shed became necessary, he, or he with another, went to a building known as the Smith building, where other employees of the defendants were at work, and picked out two 2 × 8 boards belonging to one Prew, who was the contractor for the carpenter work on that building, and used these as the cleats nailed on to the Russell building. Opposite each of these two cleats was placed a ladder, the foot resting on the roof of the shed and the top resting against the side of the Russell building. Two cross pieces were then placed in position, one end resting on the cleat and the other on a rung of one of the ladders. Then, as before, a ladder was laid on these cross pieces, on this ladder boards were placed, and the staging was complete.

The accident happened about half past four on a Wednesday afternoon, and was caused by one of these 2 × 8 boards splitting lengthwise; that is to say, the board in question had been nailed on the Russell building lengthwise, up and down; it had split in two, the two halves had dropped off, one on each side of the nails, and had let down that end of the staging. By Bramham's story the two 2 × 8 boards for cleats were procured at the Smith building that day. In addition they were by his testimony procured on the employees' own motion and without the knowledge of the defendants. Bramham testified that they got the 2 × 8 boards, in place of using the seven eighths boards used before, because they would give better security on the staging, and because the seven eighths boards which had been in use "wouldn't have been sufficient."

The plaintiff's testimony was that these 2 × 8 boards had been procured some two weeks before the day of the accident, when the work on the Russell building began. He testified that one afternoon the defendant Carmody told him (the plaintiff) to go with Bramham to work on the Russell building; that Bramham then said that they would have to have a staging between the two buildings and Carmody told them to "Go and pick it out. Find out if there is anything down cellar"; that they went to the cellar and found nothing but inch boards, "that came off packing cases, probably, sent or shipped with

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goods"; that thereupon they went to the Smith building and got two pieces of 2 × 3 boards which were used from the beginning and nailed and renailed on the Russell building from time to time, as the staging had to be put higher up in the course of the work. And that they used some inch boards found in the defendants' cellar for the cleats on the shed until the work was finished below the roof of the shed, when, as we have said, the rung of a ladder resting on the roof of the shed was substituted for a cleat nailed to its side.

The defendants' contention is that no matter which of these two stories was believed by the jury, they are not liable. Their contention is that although they were bound to furnish materials for the construction of the staging which in the case at bar confessedly was left to be constructed by the workmen, they were not in default in that respect here; for on the plaintiff's own story they had told the plaintiff and Bramham to see if there was anything in the cellar which would do, and the plaintiff and Bramham, in place of reporting that there was not, as they were called upon to do under those circumstances, procured for themselves and without the defendants' knowledge the defective board in question. They also contend that, if Bramham's story was believed, the conclusion was even stronger that the plaintiff and Bramham had chosen to provide themselves with materials in place of having the defendants furnish them.

We do not find it necessary to consider whether the defendants are correct in this contention as to the effect of Carmody's direction to "pick it out" and "find out if there is anything in the cellar"; there are some facts which we have not found it necessary to state which might have a bearing on that. For we are of opinion that, if it be assumed that Bramham and the plaintiff were under an obligation to report to Carmody that there was no fit material in the cellar, the jury were warranted in finding that the defendants through Sullivan afterwards adopted the 2 × 3 boards brought from the Smith building as their material for this staging.

The plaintiff testified that at noon on the day of the accident the work had reached the point where it could not be done standing on the roof of the shed, and that before going back to work in the afternoon of that day he with Bramham had a talk

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with the defendant Carmody. At this talk Bramham told Carmody that they could not go any further without a swinging stage, and thereupon Carmody told Sullivan (the other defendant) to get a swinging stage for Bramham and the plaintiff. On the uncontradicted evidence the defendants did not own a swinging stage. Sullivan, accompanied by Bramham and the plaintiff, then went to a painter and tried to borrow a stage but without success. Thereupon Sullivan said: "Come down to the building and see what we can do." At the building Bramham said: "If we should nail two blocks on the side of the building, and put a ladder up, and make it run across, pass from the rung of the ladder to this block, I should think we would get along all right." To this Sullivan assented and told Bramham and the plaintiff to go to the shop and get two ladders in addition to the ladder they already had there. This they did. When they came back Sullivan had gone. The staging was made and the accident happened (as we have said) on the same afternoon.

For the staging to be constructed as Bramham suggested it was the defendants' duty to furnish proper materials under the settled rule in this connection. See for example *Brady* v. *Norcross*, 172 Mass. 331; *Thompson* v. *Worcester*, 184 Mass. 354.

The jury were warranted in finding that the 2 × 3 boards, one of which caused the accident now in question, were then nailed on the Russel building, and that Sullivan, by adopting Bramham's suggestion and not offering other material for use in making the cleats which Bramham's suggestion required, authorized the use of these boards and so made them their own for the purpose of this staging.

The defendants have also contended that there was no evidence that the 2 × 3 board which split was unsuitable. In support of this contention they urge that on the evidence it was no more likely that the split came from the wood being unsuitable than from its having been nailed and renailed on to the Russell building some six times before the time in question. But the jury were warranted in finding that the board was adopted by the defendants as their material after it had been renailed these six times; and we are of opinion that the fact that such a board split under the circumstances under which it split in the case at bar is evidence from which the jury were warranted

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in inferring that it would have been seen to be unfit had it been inspected.

The question of evidence raised by the defendants not having been argued must be treated as waived, and need not even be stated.

Exceptions overruled.

VICTORIA LACOUR *vs.* SPRINGFIELD STREET RAILWAY COMPANY.

CHARLES F. LACOUR *vs.* SAME.

Hampden. September 22, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street Railway.

At the trial of an action of tort against a street railway company, brought by a woman to recover for personal injuries alleged to have been received by her because, while she was entering a car of the defendant at the rear platform, the car was started so suddenly as to cause her to fall upon the platform, there was evidence tending to show that the car was a small, closed electric car, that the plaintiff, in the act of entering the car, had one foot on the platform and was in the act of bringing the other foot from the step up to the platform, in the meantime having a good hold upon a brass rod which ran across a back window of the car immediately at her right, when, at a signal from the conductor to the motorman, the car was started so suddenly that her good hold was broken, she was thrown against an electric controller at the back of the platform, and then fell to the floor. *Held*, that there was evidence of negligence of the conductor in starting the car too soon, and of the motorman in starting it with too violent a jerk.

TWO ACTIONS OF TORT, the first for personal injuries alleged to have been received by the plaintiff and due to her having fallen upon the floor of a platform of a car of the defendant because the car was started suddenly as she was in the act of entering it. The second action was by the husband of the plaintiff in the first. Writs in the Superior Court for the county of Hampden dated April 16, 1907, and February 11, 1908, respectively.

The cases were tried together before *Wait, J.*, and verdicts were found for the plaintiffs. The defendant alleged exceptions. The facts are stated in the opinion.

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The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendants.

J. B. Carroll & W. H. McClintock, for the plaintiffs.

LORING, J. If Mrs. Lacour's story was believed, there was a case for the jury in both cases. Her story was that she signalled a small closed electric car, belonging to the defendant, to stop for her, and that when she had one foot on the step and the other on the platform, and while she was in the act of bringing on to the platform the foot on the step, the conductor signalled to the motorman to start the car, and it started forward suddenly and with such a jerk that it broke a good hold which she had on one of the brass rods across the rear window, and she was thrown against the controller with such force that she rebounded and fell on her hands and knees.

It was for the jury to say whether the car was started too soon, as in *Gordon* v. *West End Street Railway*, 175 Mass. 181, and in *Hamilton* v. *Boston & Northern Street Railway*, 193 Mass. 324. The plaintiff in the case at bar had not got fully and fairly on the car within the rule established in *Weeks* v. *Boston Elevated Railway*, 190 Mass. 563, and in *Sauvan* v. *Citizens' Electric Street Railway*, 197 Mass. 176. In the first of these two cases the person injured was walking up the aisle of the car when the sudden start came, and in the second she was stepping from the platform into the body of the car.

It was also for the jury to say on the evidence in the case at bar whether the motorman was negligent in starting the car as he did. The evidence here went further than that in *McGann* v. *Boston Elevated Railway*, 199 Mass. 446; *Stevens* v. *Boston Elevated Railway*, 199 Mass. 472; and the cases on which the decisions in those two cases were made. The evidence in the case at bar supplied what was missing there, namely, the description of a physical act which could be said to be a negligent one. In the case at bar the start of the car was so sudden and violent as to break the "good hold" which the plaintiff had on the brass rod across the window.

Exceptions overruled.

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M. F. PRICE & others *vs.* ABRAHAM ROSENBERG.

Worcester. September 28, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Validity. *Fraud. Sale. Estoppel. Evidence*, Extrinsic affecting writings. *Practice, Civil*, Exceptions.

If upon the solicitation of a salesman a person signs two order blanks for goods, one retained by the signer and the other taken away by the salesman, he can show, when sued by the principal of the salesman on his alleged contract contained in the blank taken away by the salesman, that the salesman falsely and fraudulently represented to him that the blank taken away by the salesman and afterwards attached to the declaration was the same as the blank retained by the defendant and that the defendant signed the blank attached to the declaration relying on this false and fraudulent representation, and these facts if shown are a good defense to the action.

In an action for the price of goods alleged to have been sold and delivered under the terms of a printed order blank signed by the defendant, in which the defense set up is that the defendant's signature upon the order sued upon was obtained by false and fraudulent representations of the plaintiff's salesman, if it appears that the defendant returned the goods sent to him by the plaintiff stating only that they were not what the plaintiff's salesman had agreed to send, this is not inconsistent with the position that the defendant's signature to the paper annexed to the plaintiff's declaration was procured by fraud and therefore that the paper is not the contract really made between the parties.

In an action for the price of goods alleged to have been sold and delivered under the terms of an order blank signed by the defendant, in which the defense set up is that the defendant's signature to the instrument sued upon was obtained by fraud on the part of the plaintiff's salesman, the defendant may show by oral evidence that a different agreement was made between him and the plaintiff's salesman by word of mouth.

In an action for the price of jewelry alleged to have been sold and delivered under the terms of an order blank signed by the defendant, it appeared that the signature of the defendant to the order blank was procured by a salesman of the plaintiff, who exhibited samples of the jewelry named in the order blank, and the plaintiff testified that the jewelry delivered to the defendant was up to the samples furnished by the plaintiff to the salesman who dealt with the defendant. The defendant offered evidence to contradict this testimony which was admitted by the judge against the objection and subject to the exception of the plaintiff. The order blank signed by the defendant contained a provision called a "warranty and exchange obligation" clause, which terminated as follows: "The purchaser hereby waives all right to claim . . . that goods are not like sample . . . unless he has exhausted the terms of warranty and exchange." It was admitted that the defendant had not exhausted the terms of that clause. The plaintiff asked the judge to instruct the jury that by force of this clause the fact that the jewelry was not up to sample was of no consequence, and the judge gave this instruction. *Held*, that, when the plaintiff, as a part of his original case introduced in evidence his testimony that the jewelry delivered

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was up to the sample shown to the defendant by his agent, he must be taken to have been proceeding at that time on the ground that the jewelry was up to sample, waiving his rights under the clause of the contract above described, and therefore that the plaintiff's exception to the admission of the defendant's evidence in contradiction was not well taken, and did not become good when the plaintiff changed his mind and asked for the instruction under the clause of the contract described above.

CONTRACT for goods sold and delivered under a contract contained in a printed form signed by the defendant, which is described in the opinion. Writ in the First District Court of Northern Worcester dated March 29, 1906.

The defendant's answer was (1) a general denial; (2) that the goods set forth in the schedule annexed to the declaration were never delivered to or accepted by him; (3) a specific denial of the genuineness of his signature [waived]; (4) that the contract declared on was not the entire contract entered into by him and that as a part thereof he ordered certain goods not specified therein which were not sent; (5) "and further answering the defendant says that if he signed the order, schedule or agreement annexed to the plaintiffs' declaration, he was induced to sign said agreement by the false and fraudulent representations of the plaintiffs that said order, schedule or agreement was in all respects the same as a certain order, schedule or agreement actually signed by the defendant, left with him and now in his possession, and that the said signature to the order, schedule or agreement attached to plaintiffs' declaration was obtained by said plaintiffs by trickery and sleight of hand"; (6) that the order attached to the plaintiffs' declaration had been altered in a material particular; (7) that if the defendant signed the order, a copy of which was attached to the declaration, it was upon the express condition that certain merchandise other than the articles scheduled should be sent to him as a part of the order and that said merchandise was not sent; (8) that the sale was by sample and that the goods did not correspond with the samples exhibited.

On appeal to the Superior Court the case was tried before *Wait*, J. During the plaintiffs' opening the defendant's counsel stated that the defendant would not rely upon the third paragraph of his answer denying the genuineness of his signature. The evidence at the trial is described in the opinion, where also

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are stated the rulings of the judge to which exceptions were taken. The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

C. E. Tupper, for the plaintiffs.

J. A. Stiles, for the defendant.

LORING, J. On August 20, 1901, a travelling salesman of the plaintiffs called upon the defendant at his store in Gardner, Massachusetts. The plaintiffs are manufacturers of jewelry in Iowa City, Iowa. The defendant at that time was in the hardware business, although "he had handled jewelry about two years before when he was in the clothing business."

The defendant testified to what was said and done at his store on August 20. The plaintiffs' salesman did not testify at the trial.

The defendant's story was that, after he had told the plaintiffs' agent that jewelry was not "in his line" and that he did not wish to buy, the agent asked leave to show his (the agent's) samples, and that on the defendant's consenting the agent spread them out on a counter in the rear of the defendant's store. The agent had a list like that attached to the declaration, and the defendant examined the samples with the list. The defendant then told the agent in substance that "things like ladies' rings and belt buckles and such stuff as this" he could not use, but that he carried "a line of silverware, spoons, knives and forks," and that if he would sell him spoons, knives and forks of the same quality as those made by Rogers he might give him an order. To which the salesman answered: "It does not make any difference to us, so long as the order is for $250." The salesman then presented a printed order in blank like that annexed to the declaration. "That they had some talk as to terms and that the printed order shown him was changed to correspond with the terms of their agreement in respect to the time and manner of payment; that the printed contract spoke about notes and that it was changed so that he was to pay by check instead of notes," and that the defendant told him to "strike out the articles I don't want, and be sure to send me the balance in silverware." This the salesman agreed to do. A customer then came into the defendant's store and, in the words of the defendant, "I left him with the papers there to straighten out." Later the salesman called him and said, "I

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am very busy. I have to take the next train. Will you sign the contract?" The defendant then went to the rear of his store where the paper or papers were spread out on a counter. "I glanced it over, and noticed the items were crossed out, and I signed it." The defendant also testified: "I don't remember whether I signed both or not. I know I signed a paper, but don't remember whether I signed both. He slided them over like this (illustrating with the two papers on the stand), and he said, 'You kindly sign that.' And I signed that one, and he folded it up like this, the contract, and he took his in his pocket, and I took mine in my pocket and went to finish my business with a customer, and that is all I know about it."

There was evidence that the plaintiffs' salesman's statement that he was very busy and had to take the next train was not true. It appeared that the defendant did sign two printed blanks like that attached to the declaration.

The blank annexed to the plaintiffs' declaration, before anything was written in it, was as follows: It begins with the words "W. F. Main Co., Manufacturing Jewelers," as a heading. Beneath this is an offer by W. F. Main Company to give to the purchaser one hundred orders, each for twenty-five cents' worth of jewelry, to be distributed to persons buying one dollar's worth of jewelry of him. The contract then proceeds as follows:

"Warranty and Exchange Obligation: — Any jewelry in this assortment failing to wear satisfactorily will be duplicated free of charge if returned to us within five years. Jewelry can be exchanged for new jewelry in plated, filled or solid gold any time within twelve months from date of invoice. The purchaser hereby waives all right to claim failure of consideration, or that goods are not like sample, or not according to order; unless he has exhausted the terms of warranty and exchange.

"Profit Guarantee. — We guarantee that the gross profits to the purchaser from the sale of jewelry purchased hereunder and the jewelry hereafter purchased, as hereinafter provided, will average fifty-four dollars per year for three years from the date of shipment, and if the gross profits do not average fifty-four dollars per year we will pay by draft to the purchaser an amount sufficient to make up the deficiency, under the following

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conditions: First, that the purchaser settle for the goods as herein provided, and if the settlement is by note, pay the same when due. Second, that the purchaser buy from us from time to time, at least quarterly, either directly or from our salesman, sufficient new jewelry at the prices named in this order to keep the assortment up in value to the amount of this order. Third, that purchaser keep a complete and accurate record of all goods sold, which record must show the number of the article sold, and the cost price, the price at which it is sold, and the name and post-office address of the buyer, and that a copy of said record, together with an itemized inventory of the jewelry remaining on hand unsold, be sent by registered letter at the end of each year to us. Fourth, that purchaser keep the jewelry well and tastily displayed in his store, in the showcase furnished for that purpose. Fifth, that purchaser will not sell or dispose of any article of jewelry at a less profit above the cost price as listed on this agreement, than is usually made on jewelry.

"Following is a list of Goods and terms for our $250.00 order.

"Positively No goods on Commission or Open Account. This Sale is Made under Inducements and Representations Herein Expressed and No Other. Goods Delivered to Customer when Delivered to Transportation Company.

"Terms: — Net cash, 30 days. Accounts past due subject to sight draft without further notice. Discount, 6 per cent., cash in 10 days. A credit of more than 30 days is only allowed where account is closed in 10 days by note, on two, four, six, eight and ten months, without interest, each for one fifth of bill. This order is subject to approval at Iowa City, Iowa."

Then follows a list of jewelry under twenty-three different headings. The jewelry under one heading, — "Collar Buttons," — is as follows:

"Collar Buttons

"2 Dozen bell post	$ 02	$ 48
4 Dozen gold plate	03	1 44
4 Dozen rolled gold plate	04	1 92
4 Dozen heavy rolled plate, full finish	12½	6 00
1 Dozen gold filled, hand engraved or stone set lever top	25	3 00
4 Dozen rolled gold plate, lever	07	3 36"

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The prices of all the jewelry under the twenty-three several headings came to $250. To this was added a showcase, a table, two shelves and some trays valued at $24.75, which were deducted, leaving the price of the whole $250. Below are these words:

" W. F. Main Co., Iowa City, Iowa: Post Office 190

" Gentlemen: — Please ship us the above assortment of goods in accordance with the above terms, at your earliest convenience.

Name of Salesman Name of Purchaser "

In both blanks signed by the defendant changes were made in the clause as to the terms of payment. In the one kept by the defendant lines were drawn through the following headings and through all the lines under them, namely: " Belt Buckles," " Filled Rings," " Chased Band Rings," " Friendship and Baby Rings" and " Set Rings." A line was also drawn through the words: " Gentlemen: — Please ship us the above assortment of goods in accordance." In this printed blank kept by the defendant nothing was substituted for these items stricken out amounting to $69.10, and no change was made in the footing of $250 as the price of the articles specified.

There were no changes in the printed order taken away by the salesman except the changes as to the terms of payment.

The plaintiffs introduced evidence that they shipped to the defendant the articles specified in the printed order signed by the defendant and kept by their salesman; and that on September 9, 1901, the defendant wrote to the plaintiffs that he returned the jewelry sent because it was not what their salesman agreed to send. Later the plaintiffs sent to the defendant a copy of the order returned to them by their salesman. The defendant then wrote that this did not agree with his copy, and requested them to ask their salesman " what assortment of jewelry he agreed to send." In two subsequent letters the defendant pointed out that the plaintiffs had not asked their salesman this question. In the last of these letters he wrote: " This is the article he agreed to send me, Cuf. Buttons, Collar Buttons, Men's Watch Chains, Silver Spoons Knives and Forks, & Tea Spoons, and to leave out the watches, Rings, Buckles, Belt." The correspondence ended by a letter from the defendant dated October 26, 1901,

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in which he said: "I have explained you enough, what kind of an assortment I bought of your Mr. Schweriner, and I have nothing more to say. Don't write me any more letter, just save your stamps, for I shall not answer." On March 29, 1906, the writ in this case was sued out.

At the close of the evidence the plaintiffs asked for the following rulings: "First. That the plaintiffs were entitled to recover on all the evidence. Second. That on all the evidence the defendant showed no grounds of defense. Third. That on all the evidence the defendant showed no fraud or trickery or sleight of hand in procuring the contract. Seventh. That the plaintiffs were entitled at least to recover for the amount of the contract less the amount of the goods which were stricken out of the schedule." These were refused by the presiding judge. In place of giving these rulings the presiding judge instructed the jury that the defendant was bound by his signature to the blank produced by the plaintiffs if it was not procured by fraud; but "if a different contract was substituted fraudulently, the defendant can defend against it in this case, and that is the contract that is sued on in this case; that is the one the plaintiffs must recover on, if at all, here. He may be able to sue, gentlemen, on the second contract, if that was entered into without fraud, but that is not his case here. His case is: You signed this particular contract, and you are liable on it. Now if he did and his signature was not secured by fraud, the defendant is liable. But if he was induced to sign it by fraud (his signature obtained to one paper, and not negligently but as a result of fraud he was signing a different contract from what he thought he was), then he is not bound by it."

At the argument of the case in this court the defendant's counsel took a position which does not seem to have been taken at the trial. That position is that the blank signed and kept by the defendant was not intended to become and never became a contract at all. That the purpose and effect of striking out the words "Gentlemen, please ship us assortment of goods in accordance" was to make that blank a memorandum of some of the articles which were verbally bought and sold, and of the terms on which the articles there specified together with the silver spoons, knives, forks and teaspoons substituted for those

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stricken from the blank were bought and sold by word of mouth. The position is well taken, and if it had been taken in the pleadings and at the trial much confusion would have been avoided. A great deal of confusion was injected into the case by the defendant's assuming in his pleadings and at the trial that the blank kept by the defendant was a contract.

It is enough to say now that the rulings asked for and stated above were not based upon the pleadings, that we are of opinion that the jury were warranted in finding that the plaintiffs' salesman falsely and fraudulently represented to the defendant that the blank since attached to the declaration was the same as the blank kept by the defendant, and that the defendant signed it relying thereon. "Fraud may be proved from the acts and conduct of a party quite as effectively as from their declarations." In our opinion a case of fraud was made out within the rule laid down in *McNamara* v. *Boston Elevated Railway*, 197 Mass. 383. See *Trambly* v. *Ricard*, 130 Mass. 259; *Freedley* v. *French*, 154 Mass. 339. It follows that the exceptions to the refusal to give the first, second, third and seventh rulings asked for must be overruled.

The plaintiffs also asked the judge to instruct the jury that "The defendant if he is entitled to go to the jury is estopped from claiming any other defense than that claimed by him at the time of his return of the property received by him from the plaintiffs." In support of this ruling the plaintiffs have cited *Curtis* v. *Aspinwall*, 114 Mass. 187, and what was said by Knowlton, J., in *Brown* v. *Henry*, 172 Mass. 559, 567. As we understand the plaintiffs' contention in this connection it is that the defendant cannot now set up that his signature was procured by fraud because the only objection made was that the goods were not what he agreed to take. But there is no inconsistency in the defendant's asserting that his signature to the paper annexed to the plaintiffs' declaration was procured by fraud and therefore that that paper is not the contract between the plaintiffs and himself, and at the same time asserting that the goods sent do not fill the contract really made between them at that time.

There were also some exceptions to the admission and exclusion of evidence.

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The judge was right in admitting in evidence a narrative of the facts leading up to the signing of the blank annexed to the declaration, including evidence of what the agreement was which was made by word of mouth. The fraud in obtaining the defendant's signature here in question could not otherwise have been proved.

As part of their evidence in chief, two of the plaintiffs testified that the jewelry delivered to the defendant was up to the samples furnished by them to their salesman who dealt with the defendant, as evidence that they were up to the samples on which the defendant's order was based. When the defendant offered evidence contradicting that, the plaintiffs objected, and on the evidence being admitted took an exception. They now urge that the evidence should not have been admitted because by force of the concluding part of the "warranty and exchange obligation" clause of the contract the fact that the goods delivered are not up to sample is no defense unless the purchaser has exhausted the terms of warranty and exchange, and it was admitted that the defendant had not exhausted the terms of that clause of the contract. But when the plaintiffs, as part of their original case, introduced in evidence testimony that the jewelry delivered was up to the sample shown to the defendant by their agent, they must be taken to have waived this clause in the contract. They had a right to waive their rights under that clause and to proceed on the ground that the jewelry was up to sample. In that state of the case the evidence was rightly admitted. Later the plaintiffs changed their minds and asked the judge to instruct the jury that by force of this clause the fact that the jewelry was not up to sample was of no consequence, and the judge did so. But that did not make the exception to the admission of this evidence good which was not well taken when the evidence was admitted.

The exception must also be overruled which was taken to the testimony of one Nathan. He was allowed to testify that the designation of the articles in the paper annexed to the declaration did not describe specific articles known to the trade, and that he could not fill such an order by those designations without further information. This testimony must be taken to have meant that such an order could not be filled without further in-

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formation. This evidence doubtless was admitted by the presiding judge before the plaintiffs abandoned their effort to prove that the goods delivered were up to sample. It is nothing more than testimony to a fact which is obvious from an inspection of the face of the paper. The plaintiffs cannot complain of its admission.

There was an exception to the ruling of the judge excluding this question to two of the plaintiffs: "You may state how you know that the goods which you delivered to the defendant were the identical goods called for in the contract order." This evidence was rightly excluded. It assumes that the goods delivered to the defendant were the goods called for in his contract. Its exclusion, if it had been wrong, became immaterial when the judge at the plaintiff's request instructed the jury that this issue as to the goods being or not being up to sample was made immaterial by the "warranty and exchange obligation" clause.

The next question excluded by the court was as follows: "You may state whether or not the defendant has ever made any claim under the warranty or exchange obligatory clause as provided for in the contract order." This would seem to have been excluded before the plaintiffs changed their minds and when they were trying the case on the basis that the goods were up to sample, that is to say, on the basis that their rights under the "warranty and exchange obligation" clause were waived. In that state of the case the question was properly excluded. In addition it became immaterial when the judge instructed the jury that no claim had been made under this clause of the contract.

The last question excluded was: "You may state whether or not the defendant has ever made any claim under the profit guarantee clause." The answer expected was: "He has not." How the plaintiffs would be benefited by the fact that the defendant had not made any claim under that clause is not explained by their counsel in the argument. We are of opinion that it was entirely immaterial.

Exceptions overruled.

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PATRICK J. BANAGHAN *vs.* MARY A. MALANEY.

Worcester. September 28, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Jurisdiction, Specific performance, Damages. *Equity Pleading and Practice*, Bill.

The plaintiff in a bill in equity seeking specific performance of an agreement to sell and convey certain real estate does not have an absolute right to a decree ordering specific performance merely because the agreement was made by a defendant competent to make it, was sufficient upon its face and was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it; but the granting of such a decree rests in the sound discretion of the court, and, where the judge also finds facts tending to show that, in inducing the defendant to make the agreement, the plaintiff was guilty of unfair conduct or took any inequitable advantage of the defendant, he may refuse the decree, although the plaintiff was not under any fiduciary relation to the defendant.

At the hearing of a suit in equity for specific performance of an agreement in writing by the defendant to convey certain real estate to the plaintiff, the judge found that the agreement was made by the defendant, who was legally competent to make it, that it was sufficient on its face, and that it was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it; but he also found that, because of unfair and inequitable conduct on the part of the plaintiff in procuring the agreement, specific performance should be refused, and dismissed the bill. The plaintiff appealed and contended that the suit should have been retained for the assessment of damages. There was no prayer for damages in the bill, and it did not appear that the plaintiff had requested that his damages be assessed. *Held*, that the appeal should be dismissed, since the court was not bound to retain the bill for the assessment of damages.

BILL IN EQUITY, filed in the Superior Court for the county of Worcester July 15, 1907, seeking specific performance of an agreement by the defendant to convey certain real estate to the plaintiff.

There was a hearing before *Wait*, J., who filed a memorandum containing the following findings of facts:

"I find that the plaintiff and defendant entered into the contract alleged in the bill; that the defendant was competent to make the contract, was the owner of the premises dealt with, was not induced by any fraud or misrepresentation to sign the contract, and, at law, is bound thereby.

"William Banaghan, a real estate broker and dealer, brother

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and agent of the plaintiff, suspecting a desire on the part of the New York, New Haven and Hartford Railroad Company to acquire the defendant's real estate and other parcels in the neighborhood for the purpose of connecting the tracks of its New England and Providence divisions, visited the defendant on Saturday, July 18, 1907, and, without disclosing this suspicion, persuaded the defendant to agree to sell to the plaintiff, and agreed on behalf of the plaintiff to buy the defendant's real estate. The defendant, who was unable to read and write, signed the agreement [to convey] by her mark. The price stated was the fair market value of the premises, possibly a little higher price, apart from any demand arising from the plans of the railroad company. . . . No one but William Banaghan and the defendant were present during the negotiations and at the execution of the agreement, which was written out by Banaghan in her presence and read over to her before she signed it by her mark.

"The defendant was an old woman of no experience in dealing in real estate and unsettled and unstable in her dealing. Her business affairs for many years had generally been conducted after consultation with James S. Brown, Treasurer of the Worcester Five Cents Savings Bank, which held the first mortgage on the premises, or with one Sprague, an old friend, once her employer; and she had been warned by Brown never to sell her property without first consulting him. . . . In the course of negotiations with Banaghan the defendant told him of her understanding with Brown and her desire to confer with him. Indeed, at first, she refused to sell. Banaghan, however, urged her to deal with him on the spot, and the fact that both Banaghan and she were Irish undoubtedly helped bring about the contract.

"This trade was concluded about noon. Banaghan paid down $25 in bills and went away, leaving no copy of the agreement with her. . . . About four o'clock in the afternoon of the same day, one Moore, employed by the railroad company to secure options on the lands it wanted, called upon the defendant for that purpose. On his opening negotiations the defendant told Moore she had sold to Banaghan that day for $1,900. Moore asked if she had signed any paper, and on being told she had,

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asked to see it. She told him she had no copy; and, in answer to the question, said further that the paper was not witnessed. Moore, thereupon, told her she was not bound by the agreement to sell, and offered her $2,200 to sell to him. She refused. He then offered her $2,400, of which $50 was to be paid down, and to protect her against any claims of Banaghan under the agreement with him. She thereupon took the $50, and signed an agreement to convey to Moore. . . .

"Moore told the defendant to return to Banaghan the $25 he had given her; and on July 15, 1907, she [attempted to do so, but he refused to accept the money, and] the plaintiff immediately filed this bill. . . .

"On August 8, 1907, a conservator of defendant's property was appointed by the Probate Court on her petition, who was made a party to this bill, appeared by counsel, and, in person, attended at the hearing before me.

"I do not find any disposition on the part of the defendant's counsel, the conservator or her advisers to assist the plaintiff; while the defense to the bill has been carried on chiefly by the counsel for Moore, really in the interest of the railroad company.

"The plaintiff's agent and the defendant were not of equal mental ability; the defendant was aged, inexperienced, wavering; the agent did not disclose his conjectures as to the railroad's plans; he did persuade her to act without first consulting her friends and advisers, and played upon her racial prejudices in plaintiff's behalf; and although I am convinced that, in the absence of the action by Moore and knowledge of the railroad company's intentions, the defendant and her advisers would have made the conveyance to the plaintiff and have been properly satisfied with the price agreed on, in view of these facts I think the plaintiff is not in equity entitled to the specific performance prayed for, but should be left to his actions at law for damages against the defendant and the railroad company if any he has."

A decree dismissing the bill accordingly was entered, and the plaintiff appealed.

The case was submitted on briefs.

B. W. Potter & P. Potter, for the plaintiff.

E. Brown & C. A. McDonough, for the defendant.

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SHELDON, J. The judge had a right, upon his findings, to refuse to give the plaintiff a decree for specific performance of his agreement with the defendant. It is true that the agreement was good and sufficient upon its face; the defendant was legally competent to make it; and it was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it. But this is not enough to entitle the plaintiff as a matter of right to enforce specific performance. His right to this remedy is not an absolute one. It rests in the sound discretion of the court. It may be refused to one who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for the rescission of the agreement. *Curran* v. *Holyoke Water Power Co.* 116 Mass. 90. *Western Railroad* v. *Babcock*, 6 Met. 346, 352. This rule has been recognized in the later decisions of this court. *O'Brien* v. *Boland*, 166 Mass. 481. *Thaxter* v. *Sprague*, 159 Mass. 397. And see the cases collected in 26 Am. & Eng. Encyc. of Law, (2d ed.) 62–67.

The defendant was an aged, inexperienced and ignorant woman. The mental ability of the plaintiff's agent was superior to hers; he persuaded her to refrain from consulting the adviser upon whom she was disposed to rely, and wrought upon her racial prejudices to persuade her to make the agreement at once upon the terms which he offered. After having thus kept her from obtaining the independent advice which she desired, he did not disclose to her the circumstances which led him to believe that a higher price could be obtained for the property. He was not of course under any fiduciary obligations to her; but this conduct on his part does not entitle him to favorable consideration in a court of equity. He took an inequitable advantage of the defendant.

The plaintiff further contends that his bill, instead of being dismissed, should have been retained for the purpose of giving him relief in damages. Undoubtedly this might have been done. It was done in *Rosenberg* v. *Heffernan*, 197 Mass. 151. Presumably it would have been done here, if the plaintiff had so requested. But the court was not bound to adopt this course; it might leave the plaintiff wholly to his remedy at law, as was done in *Curran* v. *Holyoke Water Power Co.* 116 Mass. 90. In

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Milkman v. *Ordway*, 106 Mass. 232, relied on by the plaintiff, as in *Tobin* v. *Larkin*, 183 Mass. 389, *Lexington Print Works* v. *Canton*, 171 Mass. 414, and similar cases, the plaintiff had lost his right to purely equitable relief without fault on his part. The rule of those cases is not applicable here. The plaintiff has not asked for leave to change his bill by amendment into an action at law for damages, as in *Merrill* v. *Beckwith*, 168 Mass. 72.

Decree affirmed.

GEORGE A. SMITH *vs.* SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

SAME *vs.* BOSTON INSURANCE COMPANY.

SAME *vs.* AGRICULTURAL INSURANCE COMPANY.

Worcester. September 29, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Insurance, Fire. *Evidence*, Admissions and confessions.

In an action on a policy of insurance against fire in the Massachusetts standard form, upon the question whether a statement in writing signed and sworn to by the insured was forthwith rendered to the company as required by the terms of the policy, there was evidence that the insured property was destroyed by fire in the night, that on the afternoon of the next day the plaintiff learned of the fire, that thirteen days later he delivered a sworn statement to the insurance broker through whom he had procured the insurance, supposing that he was authorized to receive it, that the broker returned the statement to the plaintiff on the ground that he had no right to receive it, that a new statement was signed and sworn to and was furnished to the company twenty-one or twenty-six days after the night of the fire, that the plaintiff was the holder of the legal title of the property insured but held it for the benefit of a national bank of which he had been the cashier and of which he was the official liquidator under winding up proceedings, that the title had been acquired by the foreclosure of a mortgage, that it was understood between the plaintiff and the mortgagor that the mortgagor was to have the balance of the proceeds of the property after his debt to the bank had been paid in full, that the insurance was upon the building and its contents, which included the furniture and fixtures of a summer hotel of considerable size, that the plaintiff was occupied every day with his duties as liquidator and knew nothing about the building or its contents and accordingly left to the mortgagor the preparation of the statement, that immediately after the fire the mortgagor was sick and was confined to his house under a physician's care for a number of days, and that the plaintiff also was delayed somewhat in getting from the architect the specifications

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of the building. It did not appear how long the insurance broker retained the statement after it was delivered to him before returning it to the plaintiff, but an inference might have been drawn that he did not return it without first conferring with the defendant. *Held*, that a judge, before whom the case was tried without a jury, was warranted in finding that the plaintiff used due diligence in complying with the requirement of the policy that the sworn statement should be "forthwith rendered to the company."

If in an action on a policy of insurance against fire there is evidence that the plaintiff, on the day after a fire had destroyed the insured property but before he had learned of it, stated to an agent of the defendant that the policy had been cancelled and that no liability attached to the company, a judge, before whom the case is tried without a jury, is warranted in finding that the plaintiff had assented to the cancellation of the policy before the loss occurred.

THREE ACTIONS OF CONTRACT by the same plaintiff respectively against three different insurance companies on policies insuring the plaintiff against loss by fire to a hotel in Quincy known as the Hotel Shelton and its contents, which were destroyed by fire shortly after midnight of December 2, 1903. Writs dated April 11 and 12, 1904.

In the Superior Court the cases were heard by *Wait*, J., without a jury. In the first two cases the defendant asked the judge to rule as follows: "Upon all the evidence the plaintiff is not entitled to recover. No statement in writing signed and sworn to by the insured was forthwith rendered to the company as required by the terms of the policy." The judge refused to rule as requested and found for the plaintiff in each of these cases. The evidence in regard to the furnishing of the statement is described in the opinion.

In the third case the judge found for the defendant on the ground that the policy was cancelled. The findings of the judge on this question were as follows: "Crowell [the agent through whom the plaintiff procured the insurance] saw the plaintiff and told him of the demand for the Agricultural policy [for the purpose of cancellation]. When this was done was not clear, but I am satisfied it was some days before the fire, and that the plaintiff then determined to give up the policy and return it for cancellation intending to secure other insurance in its place, but I do not find he made the securing of such other insurance a condition of the surrender for cancellation. No written demand was made at any time on the plaintiff and no tender of return premiums was made to him by the company or by any one on its behalf;

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no tender of such premiums was made to Crowell by any one. The property insured was totally destroyed by fire shortly after midnight of December 2, 1903. A special agent of the Agricultural Insurance Company, with knowledge of the fire, saw the plaintiff on December 3 at Worcester, and without telling him of the loss, asked whether the Agricultural policy was cancelled. The plaintiff said he understood that the policy was cancelled and that no liability attached to the company. He offered the policy to the special agent, who, however, suggested that it be sent to Mr. Crowell. The plaintiff, still ignorant of the loss, sent the policy to Crowell about noon time, and in Crowell's office it was marked cancelled as of November 18, 1903, and was delivered to the special agent. Crowell knew of the loss at the time. I find that the plaintiff before the fire knew of and assented to the intended cancellation of the policy, and that, upon his actual surrender of the policy into Crowell's hands for cancellation, he intended the surrender to become complete as of a date corresponding to the notice of the desire to cancel, which would be before the date of the fire."

The judge reported the three cases for determination by this court, raising only the questions which are mentioned above.

T. H. Gage, Jr., for the plaintiff.

F. W. Brown, for the defendants, submitted a brief.

SHELDON, J. 1. In the first two of these cases the only question raised is whether the judge erred in refusing to rule, as requested by the defendant, that no statement in writing, signed and sworn to by the insured, was rendered to the company forthwith after the loss, as required by the terms of the policy; and that for this reason the plaintiff could not recover.

The policies were in the Massachusetts standard form, prescribed by R. L. c. 118, § 60 (see now St. 1907, c. 576, § 60), and contained the stipulation that "in case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as

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known to the insured." Compliance with this stipulation is a condition precedent to the insurer's liability. *Boruszewski* v. *Middlesex Assur. Co.* 186 Mass. 589, 590, and cases there cited. And see *Hatch* v. *United States Casualty Co.* 197 Mass. 101.

The property insured by these policies was totally destroyed by fire on December 2, 1903, and the plaintiff learned of the fire on the afternoon of the next day. He signed and swore to written statements and delivered them on December 16, 1903, to one Crowell, an insurance broker, whom he supposed to be authorized to receive them, but who, it has been found, had been really his own agent. Crowell returned these statements to the plaintiff on the ground that he had no authority to receive them; and new statements were signed and sworn to on December 21, and were furnished to the companies. The defendant in the first case, the Scottish Union and National Insurance Company, received its statement on the twenty-third, and the defendant in the second case, the Boston Insurance Company, received its statement on the twenty-eighth day of the same month.

The general rule to be applied in such a case was stated by the present Chief Justice in *Parker* v. *Middlesex Assur. Co.* 179 Mass. 528, 530: "The true meaning of such a requirement in a policy is that the statement shall be sent as soon as the exercise of reasonable diligence will enable the assured to send it. When it is contended that a statement was not sent in time under such a requirement, the inquiry always is whether the insured, whose duty it was under the contract to send the statement as soon as he reasonably could, has used due diligence to send it promptly. If there is no dispute in regard to the facts, what is due diligence is a question of law for the court." And he adds, page 532: "The question whether there was due diligence has been submitted to a jury in cases where the evidence was doubtful or conflicting, and where, upon the view of it most favorable to the plaintiff, the court would find due diligence." See the cases there cited to these two propositions. The facts are of course in dispute, within the meaning of the rule just stated when, by reason of their complexity or because they do not upon their face require as matter of law an answer one way or the other as to the exercise of due diligence, this question must be decided by drawing an inference of fact from the pri-

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mary facts shown. This was the rule laid down, after careful argument by distinguished counsel, in *Haskins* v. *Hamilton Ins. Co.* 5 Gray, 432, and stated by Taft, J., with very full citation of authorities in *Hamilton* v. *Phœnix Ins. Co.* 61 Fed. Rep. 379, 388. It is the general rule adopted when questions of due care or diligence have to be passed upon. *Gavett* v. *Manchester & Lawrence Railroad*, 16 Gray, 501, 506. *Foster* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 21, 25. In our opinion, this is the rule which should be followed in the case at bar.

In these cases, the facts bearing upon the question whether the plaintiff used due diligence in sending his statements to the defendants were not agreed upon, nor were they conceded at the trial. They were found by the judge upon all the evidence, and apparently were disputed until settled by his findings. They were in dispute within the meaning of the rule already stated. Did they also warrant the inference that the plaintiff under the circumstances of the case had used due diligence in sending his statements?

The plaintiff was the holder of the legal title to the property insured. In reality, he held this title for the benefit of the national bank of which he had been cashier and of which he was the official liquidator under winding up proceedings. The title had been acquired under foreclosure of a mortgage which had been given to the bank by one Taber, the former owner of the property; and it was understood between the parties that Taber was to have the property or its proceeds after the full amount due to the bank should have been paid. The insurance was upon the building and its contents, which included the furniture and fixtures of a summer hotel, apparently one of considerable size. The plaintiff was occupied with the affairs of the bank, to which as liquidator it was his official duty to attend, and was actually engaged in them every day in December. He knew nothing about the building or its contents, which might have been found to include numerous articles of furniture and fittings; and he left to Taber, who knew more about the building, the preparation of the statements. Taber was sick and confined to his house under a physician's care for some days. He was also delayed somewhat in getting from the architect the

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specifications of the building. But in spite of these circumstances statements were prepared and sworn to and delivered to Crowell on December 16. Crowell, instead of forwarding them to the insurance companies, as from his former position as agent for the plaintiff it might have been expected that he would do, returned them, as has been stated, to the plaintiff. It has not been found when this was done, and no evidence on the subject appears in the report; but the judge might have drawn the inference that Crowell did not do this without having first conferred with the defendants. New statements were then prepared and given to the defendants, one twenty-one, and one twenty-six days after the fire.

It is true of course that the plaintiff was not required by this clause in the policy to prepare and furnish a proof of loss. *Boruszewski* v. *Middlesex Assur. Co.* 186 Mass. 589, 594. *Towne* v. *Springfield Ins. Co.* 145 Mass. 582, 584. He had simply to render forthwith a statement in writing signed and sworn to, setting forth certain particulars, so far as known to himself. Undoubtedly he would not have a right to delay rendering this statement long enough to enable him to prepare formal proofs of loss such as were required under the forms of policies generally used before a standard form was established by the statutes now embodied in St. 1907, c. 576, § 60. But he is required to give these particulars so far as known to himself; and he may well take a few days, if necessary, to inform himself as to them from such sources of information as are readily within his reach. Nor is it his duty to lay aside all other occupations, and especially whatever official or public duties may be incumbent upon him, and to render the statement before doing anything else or complying with the demands of any other duty, however urgent. As he must not unnecessarily postpone this obligation to others, so he need not unnecessarily postpone other obligations paramount to this. An unexplained delay for any manifestly unreasonable time will indeed bar him from sustaining any claim upon the policy; such a delay without reasonable and sufficient explanation will be equally fatal. And if there is no explanation of such a delay by him, or if, considering whatever explanation is offered, yet upon the view most favorable to him it cannot be found that he has used due diligence,

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he cannot maintain any action upon the policy, and a verdict must be ordered for the defendant. But if from such facts as can be found the inference that he did act with due diligence would be warranted, then the question must be submitted to the jury. This is the doctrine of our own decisions. See, beside the cases already cited, *Mandell* v. *Fidelity & Casualty Co.* 170 Mass. 173, 177; *Smith & Dove Manuf. Co.* v. *Travelers' Ins. Co.* 171 Mass. 357; *Harnden* v. *Milwaukee Mechanics' Ins. Co.* 164 Mass. 382; *Swain* v. *Security Live Stock Ins. Co.* 165 Mass. 321. The trend of the decisions in other States is to the same effect. *Donahue* v. *Windsor County Ins. Co.* 56 Vt. 374. *Bennett* v. *Lycoming County Ins. Co.* 67 N. Y. 274. *Carpenter* v. *German American Ins. Co.* 135 N. Y. 298. *Martin* v. *Manufacturers' Accident Indemnity Co.* 151 N. Y. 94, 106. *Brown* v. *London Assur. Co.* 40 Hun, 101. *Inman* v. *Western Ins. Co.* 12 Wend. 452. *Trask* v. *State Ins. Co.* 29 Penn. St. 198. *Home Ins. Co.* v. *Davis*, 98 Penn. St. 280. *Edwards* v. *Baltimore Ins. Co.* 3 Gill, 176. *Whitehurst* v. *North Carolina Ins. Co.* 7 Jones Law (N. C.), 433. *Insurance Co. of North America* v. *Brim*, 111 Ind. 281. *Railway Passenger Assur. Co.* v. *Burwell*, 44 Ind. 460.

If the plaintiff had rendered a statement immediately upon learning of the fire, with his limited knowledge of the circumstances and of the amount, nature and value of the real and personal property destroyed, he necessarily would have made both omissions and misstatements. He would have been in danger, though making his statement of the particulars only so far as known to himself, of furnishing *prima facie* evidence against the extent of his future claim. In view of the intimation of Field, J., in *Towne* v. *Springfield Ins. Co.* 145 Mass. 582, 584, that his neglect or refusal to furnish a detailed statement might be some "evidence of an attempt to defraud the company," he might be exposed to a yet more serious danger. We cannot say that a delay of merely a few days to acquire information which could be obtained by such a delay for the purpose of guarding against these dangers was as matter of law a lack of due diligence in rendering the statement required.

The bill of exceptions does not show that whatever delay occurred after the return by Crowell of the statements furnished to him by the plaintiff was necessarily fatal. This delay

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could not have exceeded seven days in one case, and twelve days in the other. There is nothing to show how long it was. It may have been due in part to the acts of the defendants themselves. The burden was of course upon the plaintiff to show the exercise of due diligence; but the judge must look at all the evidence, and could consider all the inferences reasonably to be drawn from the evidence.

We are of opinion that the judge was warranted in finding, upon the evidence before him and upon the primary facts which he found to be established, that the plaintiff had used due diligence in this behalf. It follows that he correctly refused to rule that the plaintiff could not recover in the first two cases.

2. In the third case the judge found as a fact that the plaintiff, before the loss occurred, had himself assented to the cancellation of the policy. This finding was of course fatal to the plaintiff's case if the judge had a right to make it. In our opinion, this finding was warranted by the evidence. There was evidence that the plaintiff himself, after the fire but before he learned of it, stated that this policy had been cancelled and that no liability attached to the company. This was like the admissions which were held to warrant a finding in *McMahon* v. *Lawler*, 190 Mass. 348.

Accordingly, in each of the three cases, there must be

Judgment on the finding.

THOMAS McGOURTY *vs.* JOSEPH DeMARCO.
JOHN W. O'CONNOR *vs.* SAME.

Worcester. September 29, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, In use of highway. *Law of the Road.*

At the trial of an action of tort against one who, while driving a team upon a public highway upon which were street railway tracks, ran into the plaintiff who had alighted from a street car, there was evidence tending to show that the street cars generally stopped to let off passengers, not where the car stopped on the occasion in question, but at a point marked by a white post seventy-five

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feet farther on; that the car was an open car and had just passed the team of the defendant, which was being driven on the right side of the street, that, as the car stopped, the plaintiff arose and attempted to look backward up the street, but was unable to do so because of passengers standing on the running board of the car, that, after the car had come to a full stop, he took a child in one arm, and dismounted on the right hand side and facing the front of the car, and was struck by the defendant's team coming from behind. *Held*, that there was evidence from which the jury were warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent.

There is no absolute rule of law requiring one, before dismounting from a street car into a street, to look up and down the street to see if there is any danger from passing vehicles.

One, who is dismounting into a street from a street car, has a right to expect that any one driving up from behind the car will exercise proper care to avoid running into him.

R. L. c. 54, § 2, which provides that the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of the way, applies to the driver of a team passing from behind an electric street car which has stopped to let off passengers.

The fact that, in passing from behind an electric street car which has stopped to let off passengers, the driver of the team goes to the right of the car, instead of to the left as required by R. L. c. 54, § 2, is evidence of negligence on his part.

TWO ACTIONS OF TORT for personal injuries alleged to have been received by the plaintiffs by being run into from behind, as they were alighting from a street car, by a team belonging to the defendant and driven by the defendant's son. Writs in the Superior Court for the county of Worcester dated June 16, 1905.

The cases were tried together before *Wait*, J. There was evidence tending to show that the car upon which the plaintiffs were passengers was an open car and was going in an easterly direction along Shrewsbury Street in Worcester to Seward Street, that, at some time before reaching Seward Street, the car passed the team driven by the defendant's son and stopped at a point about seventy-five feet before it reached a white post which marked the regular stopping place of street cars going in that direction at that point, that cars usually ran to the white post before stopping for passengers who were to be let off in the vicinity of Seward Street, that the plaintiff McGourty had with him a bundle and a dinner pail, and the other plaintiff, O'Connor, being then about four years of age, was seated with him in company with his, O'Connor's, mother; that, as the car stopped, McGourty rose from his seat, placed

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his dinner pail and bundle on the seat, and looked back toward the rear end of the car but was unable to see the street on account of passengers being on the running board; that, after the car had come to a full stop, he took the plaintiff O'Connor in his right arm, and, taking hold of the standard or handle of the car seat with his left hand, stepped off on to the ground, facing toward the front of the car, when they, the plaintiffs, were struck by the defendant's team; that they did not see or hear the team until they were struck.

It appeared from the evidence that it was from eight to ten feet from the street railway tracks to the sidewalk, that Shrewsbury Street was a much travelled thoroughfare in a thickly settled part of the city of Worcester and was the principal street leading to Lake Quinsigamond and Shrewsbury; that there are two car tracks in said street, and that the plaintiff McGourty was familiar with these conditions.

At the conclusion of the evidence, the defendant requested the presiding judge to direct a verdict for him, and to rule as follows: "The driver of the team had a right to expect that the car would stop at or near the next white post, its regular stopping place; and until it had become manifest to him, by circumstances which ought to apprise a person using reasonable care that a passenger was about to get off the car, he was not bound to exercise the same precautions as he would when the car was slackening its speed at or near a regular stopping place, in reference to passengers on the car about to leave the car." The court declined to rule as requested, but under instructions to which no exception was taken left it to the jury to say whether under all the circumstances the plaintiffs were using due care, and whether the defendant, through the act of his son, John De Marco, in driving as he did, was negligent. There were verdicts for the plaintiffs, and the defendant alleged exceptions.

R. B. Dodge & W. J. Taft, for the defendant, submitted a brief.

No counsel appeared for the plaintiffs.

SHELDON, J. 1. The judge rightly refused to order a verdict for the defendant. The jury were not bound to believe the testimony offered for the defendant that the car stopped suddenly with a jerk, although this was uncontradicted. *Lindenbaum* v.

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New York, New Haven, & Hartford Railroad, 197 Mass. 314, 323. They might have found that due care required the driver of the defendant's team, when he noticed that the car was slackening its speed, to anticipate the possibility of its coming to a stop and of passengers alighting, and that he failed to exercise proper care in view of this possibility. And, although the question undoubtedly was close, they might find that the plaintiff McGourty was himself in the exercise of due care. He testified that he looked to the rear of the car before leaving his seat. There is no absolute rule of law which required him to look up and down the street before actually alighting. *Hennessey* v. *Taylor*, 189 Mass. 583. *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199. *Bowser* v. *Wellington*, 126 Mass. 391. Moreover, he had the right to expect that any one driving up from behind the car would exercise proper care to avoid running into a passenger leaving the car. If the defendant was, as his counsel assumed in their brief, and as the jury certainly might find, attempting to pass the car from behind on his right hand in violation of R. L. c. 54, § 2, the jury might find that this, under the circumstances, was negligence on the driver's part such as McGourty was not called upon to anticipate. *Perlstein* v. *American Express Co.* 177 Mass. 530. The whole question was for the jury.

2. Nor could the second instruction asked for by the defendant have been given. It was for the jury to say what the defendant's driver ought to have expected as to the place where the street car might stop, and what precautions he ought under the circumstances to have taken in driving his own team. Indeed, what already has been said as to the right of the jury to pass upon the whole case is decisive as to this question also. No doubt the circumstances assumed in this request, so far as they were found by the jury, had a material bearing upon the issue of the care or negligence of the defendant's driver; but the instructions given to the jury were not complained of, and we must assume that this branch of the case was properly explained to them with sufficient instructions, as in *Tisdale* v. *Bridgewater*, 167 Mass. 248, 250.

Exceptions overruled.

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CHARLES E. WARE & another, trustees, *vs.* CITY OF FITCHBURG & another.

Worcester. September 29, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Charity. Trust. Agency. Municipal Corporations. Constitutional Law. Burbank Hospital. Fitchburg.

In this Commonwealth the Legislature have the power to control cities in their administration of public charities, especially with the formally expressed assent of the city by its acceptance of the statute making the provision, by prescribing who shall be the officers and agents to whom such administration shall be entrusted and the mode of their selection, where these matters are not provided for in the instrument creating the trust.

Gardner S. Burbank by his will gave to the city of Fitchburg a fund for the founding and maintaining of a hospital. St. 1890, c. 422, which recited the fact of this gift and quoted in full the residuary clause of the will, created a corporation by the name of the Burbank Hospital "to enable the inhabitants of said city of Fitchburg to receive the benefits of said generous bequest of said testator and effectually to realize and meet the benevolent intentions expressed in his said will." The statute provided for a board of trustees, who, with the exception of certain members *ex officiis*, should be self perpetuating, and who should report annually to the city council with an account of receipts and expenditures. Further provisions of the statute were as follows: "This act shall take effect whenever it shall be accepted by a concurrent vote of the board of aldermen and common council of the city of Fitchburg. Nothing in this act contained shall be held to alter or impair any trust created by said will. And the corporation hereby created, acting through its trustees and proper officers, shall be deemed the agent of said city of Fitchburg for the proper execution of all trusts arising under the provisions of said will. And nothing in this act contained shall be construed as releasing the city of Fitchburg from any obligation arising from the acceptance of said bequest under said will, or from any condition made therein." The city accepted the statute in the manner provided therein. Later the trustees under the will of the testator brought a bill for instructions as to whom they should pay over the trust fund, making the hospital corporation and the city defendants. The city contended that the statute was unconstitutional as an attempt to exercise the judicial power, contrary to art. 30 of the Declaration of Rights, by removing one trustee and appointing another, and also that the hospital corporation could not be regarded as its agent against its consent and without power on its part to revoke the authority. *Held*, that the title of the city to the charitable fund was not interfered with by the provisions of the statute, that the city, retaining the title to the property and its position as trustee, must act through some instrumentality, and that the Legislature had provided what they deemed to be a proper one for the purpose, which moreover had been accepted by the city, and that the city could not revoke the authority of the hospital corporation to act as its agent, as might be done between natural persons who are *sui juris*;

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therefore, that the plaintiffs should pay over the trust fund in their hands to the Burbank Hospital as the agent of the city of Fitchburg, upon its giving them proper acquittance and discharge therefor in the name of the city.

BILL IN EQUITY, inserted in a common law writ of the Supreme Judicial Court dated May 26, 1908, by the trustees under the will of Gardner S. Burbank, late of Fitchburg, against the city of Fitchburg and the Burbank Hospital, a corporation created by St. 1890, c. 422, praying, 1, that the plaintiffs might be granted the advice and aid of the court in the execution of the trusts with which they were charged, and, 2, that the defendants might be ordered to interplead and settle between themselves their rights in respect of the trust fund created under the will of Gardner S. Burbank for the purpose of founding and maintaining a hospital.

The following stipulation was signed by the counsel of all the parties: "It is hereby stipulated that this bill in equity, if improperly presented as a bill of interpleader, may be considered by the court as a bill for instructions, and it is further stipulated and agreed that the cause may be reserved upon the bill and answers for the consideration of the Supreme Judicial Court."

The case came on to be heard before *Hammond*, J., who reserved it upon the pleadings and the stipulation of the parties for determination by the full court.

St. 1890, c. 422, is as follows:

"An Act relating to the establishment of a hospital for the inhabitants of the city of Fitchburg.

"Whereas, Gardner S. Burbank late of the city of Fitchburg, deceased, in and by his last will and testament bearing date April twelfth, eighteen hundred and seventy-five, and proved and allowed at the probate court holden at Worcester within and for the county of Worcester on the sixth day of March, A. D. eighteen hundred and eighty-eight, did make provision for founding and maintaining a hospital within said city of Fitchburg and for the use of all its inhabitants, by a generous bequest, now amounting to more than four hundred and thirty thousand dollars. Now, therefore, to enable the inhabitants of said city of Fitchburg to receive the benefits of said generous bequest of said testator and effectually to realize and meet the benevolent intention expressed in his said will, therefore, —

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"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: —

"Section 1. Thornton K. Ware, George F. Fay, Amasa Norcross, Rodney Wallace, Charles T. Crocker, James Phillips, Jr., George Jewett, George D. Colony, Frederick H. Thompson, Benjamin D. Dwinnell, John J. Sheehan, Elliott N. Choate, Henry A. Willis, Harris C. Hartwell and Harrington Sibley, all of said Fitchburg, and their successors who shall be residents therein, are hereby made a corporation by the name of the Burbank Hospital, for the sole purpose of establishing and maintaining a public hospital for the use of the inhabitants of the said city and others who may be admitted thereto under the provisions of said will who may require medical and surgical treatment.

"Section 2. Said corporation shall have authority for the purpose aforesaid, and no other, to hold real and personal estate to the amount of eight hundred thousand dollars.

"Section 3. The mayor of the city of Fitchburg, the president of the common council and the city treasurer, severally for the time being, shall be trustees ex-officiis during the terms of their respective offices, and together with the corporators above named shall constitute the board of trustees, of whom the mayor shall be ex-officio chairman, and whose terms of office except as above provided shall be as follows: The trustees shall in the month of January in the year eighteen hundred and ninety-one elect five of their members whose terms of office are not fixed as above, who shall hold for the term of one year from the first day of February in the year eighteen hundred and ninety-one, and five of their own number who shall hold for the term of two years from said first day of February, and the remaining five shall be elected to hold for the term of three years from the said first day of February, and who shall severally hold for the terms for which they are elected and until their successors are chosen, and thereafter each class in succession for the period of three years. Six members of the board shall constitute a quorum except in the election or removal of trustees, when a majority of the board shall be required. Whenever a vacancy shall occur in the board of trustees by reason of the death, resignation or other-

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wise of the members so elected, the remaining trustees shall fill the vacancy for the unexpired term. If the board of trustees shall fail for three months to elect its members in accordance with the provisions of this act, the city council of the city of Fitchburg shall forthwith proceed to an election by concurrent vote. No member of the board as such shall receive compensation for his services. And the city of Fitchburg is hereby authorized and empowered to place in trust in the hands of the trustees of said corporation all funds, gifts and bequests, which are or may be held by it for the purpose of establishing and maintaining said hospital, especially all sums it may from time to time receive from the trustees appointed under the will of Gardner S. Burbank late of said Fitchburg, deceased. And said corporation shall, upon the acceptance of this act by the city council as hereinafter provided, receive and hold all past and future bequests and gifts that may be made for the maintenance of said hospital, and the same shall be appropriated, held and used by said corporation for the sole use and purpose aforesaid as a trust in behalf of and for the inhabitants of said city, and to such other persons as may be permitted to enjoy the benefits of said hospital in pursuance of the provisions of said will. And said trustees shall render to the city council annually in the month of January a report of their proceedings, with a statement of the condition of the hospital, the property and funds pertaining to the same, with an accurate account of all receipts and expenditures, together with such other information or suggestions as they may deem desirable or the city council may at any time require. And said trustees shall in behalf of said city carefully and considerately carry into execution the generous plan of the testator as contemplated by the said will.

"Section 4. And said trustees shall appoint a treasurer, and shall require of him a bond with satisfactory sureties in the penal sum of not less than twenty-five thousand dollars for the faithful discharge of his duties, and his books of accounts and vouchers shall at all times be open to the trustees aforesaid, or any one of them.

"Section 5. The trustees shall appoint a clerk whose duty it shall be to keep a full and fair record of the proceedings of the board, and to discharge such other duties as they shall from time

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to time prescribe. The compensation of the treasurer and clerk shall be fixed by the board of trustees.

"Section 6. The trustees shall have full power to elect such other officers as they may from time to time think necessary or expedient, and to determine and appoint the tenure of their offices, and of those of the treasurer and clerk; to remove any trustee who shall be incapable through age, infirmity or otherwise for the discharge of his duties as said trustee, or who by unreasonable absence from the meetings of the board shall fail to discharge the duties of his office, and generally to do all acts and things necessary or expedient to be done for the purpose of carrying into full effect the provisions and purposes of this act.

"Section 7. It shall be the duty of the trustees to safely and securely invest, or to hold invested, the trust funds derived under said will or otherwise, and they shall have regard at all times to all the provisions of said will affecting said trust and the desire of the testator as expressed therein, and particularly to the suggestions made in the following extract therefrom: —

"Extract from the will of Gardner S. Burbank.

"'And the remainder of said principal not hereinbefore disposed of under the preceding provisions of this will I direct my trustees to pay over to the city of Fitchburg as far as and as fast as it is released from the charges and annuities hereinbefore created, for the founding and maintaining of a hospital for the care of the sick. And while I do not wish to embarrass this gift with provisions and restrictions, but desire that the city shall carefully and considerately carry my plan into execution, believing that founders of benevolent institutions like the one I contemplate often create great difficulties by endeavoring to settle in advance the details of the work they have projected, still I wish to indicate in general terms two purposes which I desire to have executed. First: — I desire that a substantial and commodious hospital building shall be erected; and as I trust that my charity may survive and do good to the poor and sick for many generations, and also believe that the city of Fitchburg will in time be a large and prosperous city, I would suggest that the sum of at least one hundred thousand dollars be devoted to the purchase of the necessary land and the erection of the struc-

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ture. And I also request and direct that while those who are able to pay for the services rendered them in the hospital may be subjected to such moderate and reasonable charge as is usual in such cases in similar charitable institutions, those on the other hand who are in poverty and sickness shall ever be received and cared for kindly and tenderly "without money and without price" and without regard to color or nationality. It is by the request of my wife, whose good judgment has so greatly aided me in all the affairs and purposes of my life, that I was led to make the foregoing provision for the foundation of a hospital.'

"Section 8. This act shall take effect whenever it shall be accepted by a concurrent vote of the board of aldermen and common council of the city of Fitchburg.

"Section 9. Nothing in this act contained shall be held to alter or impair any trust created by said will. And the corporation hereby created, acting through its trustees and proper officers, shall be deemed the agent of said city of Fitchburg for the proper execution of all trusts arising under the provisions of said will. And nothing in this act contained shall be construed as releasing the city of Fitchburg from any obligation arising from the acceptance of said bequest under said will, or from any condition made therein. And the said Thornton K. Ware is hereby authorized and empowered to prescribe the time and place for the holding of the first meeting of said trustees and to notify them thereof.

"Approved June 19, 1890."

C. F. Baker, (*E. W. Baker* with him,) for the plaintiffs.

G. K. Hudson, for the city of Fitchburg.

C. F. Choate, Jr., for the Burbank Hospital.

SHELDON, J. In order to understand rightly the provisions of St. 1890, c. 422, it is necessary to have in mind the circumstances under which that act was passed.

Gardner S. Burbank, by his last will, had bequeathed the residue of his estate, subject to the contingency of his daughter's leaving children and to certain conditions stated in his will and codicils, to the city of Fitchburg for the founding and maintaining of a hospital. The result of this disposition was of course, upon the taking effect of the legacy, to create a charitable trust.

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Burbank v. *Burbank*, 152 Mass. 254, 255, 256. *Jackson* v. *Phillips*, 14 Allen, 539, 551 *et seq.*, and cases there cited. And the city of Fitchburg was made the trustee of this fund, and charged with the duty of administering it. But the testator did not do as the creator of the charitable trust considered in *Cary Library* v. *Bliss*, 151 Mass. 364, had done, by prescribing any particular method of administering the charity which he proposed to found. He expressly declared that he did not "wish to embarrass this gift with provisions and restrictions, but desired that the city" should "carefully and considerately carry" his "plan into execution"; and he simply expressed a desire that a substantial and commodious hospital building should be erected at a cost of at least $100,000, that a moderate and reasonable charge should be made to those who were able to pay for the services to be rendered to them in the hospital, but that those who were in poverty and sickness should be received and cared for kindly and tenderly, "'without money and without price,' and without regard to color or nationality." All the details of the management of the fund were left to the untrammelled discretion of the city as trustee.

But he was of course aware of the fact that the city of Fitchburg could act as the trustee of this fund and could exercise the wide discretion which he had given to it only through the medium of its officers and agents. The charter of the city, St. 1872, c. 81, provided in § 2 that the administration of all its "fiscal, prudential and municipal affairs," together with its government, should be vested in its mayor, board of aldermen and common council, and in § 12 that the city council should have care and management of all city property. Apart from the principle that the testator must be regarded as acquainted with all the general laws of this Commonwealth, the presumption is strong that as a citizen of Fitchburg and the founder of this charity he was familiar with these provisions. And he knew of course that the full control over the city in its character of a municipal corporation and one of the instrumentalities of government was vested in the State; and that the Legislature at any time, at its mere will and pleasure, as it might deem to be for the public good, could alter the frame of the city government, abolish existing offices and substitute new ones, and

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change the duties, burdens and responsibilities and the mode of election or appointment of all its officers and agents. *Stone* v. *Charlestown*, 114 Mass. 214, 224, 228. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 383, *et seq.* *Kingman, petitioner*, 153 Mass. 566, 572. *Prince* v. *Crocker*, 166 Mass. 347. *Hodgdon* v. *Haverhill*, 193 Mass. 406, 410. He doubtless considered that the safety of his charity was sufficiently guaranteed by the fact that it could not constitutionally be undone or destroyed, and that if the city of Fitchburg should lose its corporate existence or become by law incapable of administering the trust, the courts would preserve the existence of the charity and if necessary new trustees would be appointed for its management. *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509. *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 288. *Montpelier* v. *East Montpelier*, 27 Vt. 704, and 29 Vt. 12.

But there were some manifest inconveniences in the administration of a trust like this by the officers of a city government, chosen for different purposes, perhaps merely for political reasons, and subject to change at every municipal election. There were, so far as appears, no officers of the city who, without interference with their other duties, could receive and manage this fund or properly carry on and administer the hospital. There was no department of the city government authorized and adapted to take charge of this matter. It may be that the mayor and the city council, under their general powers of administration could have provided for the creation of such a department and for the appointment or election of such officers; but this was not attempted to be done. Instead of this, the Legislature, acting under its general powers of control over all municipal governments, passed the statute now under consideration.

The preamble of this statute, after reciting the bequest of Mr. Burbank which then amounted to more than $430,000, declares its purpose to be "to enable the inhabitants of said city of Fitchburg to receive the benefits of said generous bequests of said testator and effectually to realize and meet the benevolent intention expressed in his said will." For this purpose it created a corporation, by the name of the Burbank Hospital, composed of fifteen citizens of Fitchburg, who are named, and who, with

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the mayor, the president of the common council, and the city treasurer, during the terms of their respective offices, were made the trustees of the corporation. The fifteen incorporators were to fill all vacancies in their own number; and if they failed to do so, such vacancies were to be filled by the city council of Fitchburg. The third section of the statute then proceeded as follows: "And the city of Fitchburg is hereby authorized and empowered to place in trust in the hands of the trustees of said corporation all funds, gifts and bequests, which are or may be held by it for the purpose of establishing and maintaining said hospital, especially all sums it may from time to time receive from the trustees appointed under the will of Gardner S. Burbank late of said Fitchburg, deceased. And said corporation shall, upon the acceptance of this act by the city council as hereinafter provided, receive and hold all past and future bequests and gifts that may be made for the maintenance of said hospital, and the same shall be appropriated, held and used by said corporation for the sole use and purpose aforesaid as a trust in behalf of and for the inhabitants of said city, and to such other persons as may be permitted to enjoy the benefits of said hospital in pursuance of the provisions of said will. And said trustees shall render to the city council annually in the month of January a report of their proceedings, with a statement of the condition of the hospital, the property and funds pertaining to the same, with an accurate account of all receipts and expenditures, together with such other information or suggestions they may deem desirable or the city council may at any time require. And said trustees shall in behalf of said city carefully and considerately carry into execution the generous plan of the testator as contemplated by the said will." It was further provided in § 7 that the trustees should safely and securely invest or hold invested the trust funds, and should have regard at all times to all the provisions of Mr. Burbank's will and his desire as expressed therein, and especially to the suggestions made by him in his will with respect to this hospital and its management, an abstract from the will being quoted at length in this section. Section 9 of the statute reads in part as follows: "Nothing in this act contained shall be held to alter or impair any trust created by said will. And the corporation hereby

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created, acting through its trustees and proper officers, shall be deemed the agent of said city of Fitchburg for the proper execution of all trusts arising under the provisions of said will. And nothing in this act contained shall be construed as releasing the city of Fitchburg from any obligation arising from the acceptance of said bequest under said will, or from any condition made therein." And § 8 provides that the act shall take effect only when accepted by a concurrent vote of the board of aldermen and common council of the city of Fitchburg. It has been so accepted.

In our opinion, it is manifest that the purpose of this statute was to do away with any doubt of the power of the city of Fitchburg to accept this legacy and execute the trust thereby created, and also to provide a means whereby the city might, through the instrumentality of a board created and constituted its agent for that purpose, administer the trust in a proper manner, upon a consistent scheme, with due regard to the desires of the testator, and without risk of any sudden breaks or changes in the mode of administration by reason of any political or other overturns in the personnel of the city government that might be caused by the annual elections of mayor, aldermen and common council. Accordingly it was provided that only five of the trustees should vacate their positions each year, and that vacancies should be filled in the first instance by the remaining trustees, so that a proper permanence of management should be ensured, while sufficient facilities are afforded to the city government for supervision of their action and for securing a prompt redress of any possible maladministration or errors of judgment on their part by the provisions that the mayor, the president of the common council and the city treasurer for the time being shall be members of the board of trustees, and that the trustees shall make to the city council the annual report which is required by the statute. We find nothing in these provisions contrary to any article of the Declaration of Rights.

Nor can it be said that this act is unconstitutional because it takes away from the city the property which had become vested in it under the will of Mr. Burbank. Even if the statute had this effect, the objection would be cured by the fact that it was not to come into force until accepted by the city of Fitchburg,

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and that it has been so accepted. The city could not complain of a taking of its property to which it had in terms assented. The principle upon which *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 199 Mass. 279, was decided, would be applicable. But this was not the effect of the statute. There is nothing in the statute which takes away from the city its legal title in the fund. The provision that the city may place the fund in the hands of the trustees certainly does not have this result. The provision that the corporation shall receive and hold the fund, though if it stood alone its interpretation might be doubtful, cannot be construed as divesting the city of its title, when taken in connection with the requirements that they shall render a full annual report to the city council, "with such other information or suggestions [as] they may deem desirable or the city council may at any time require," that the trustees shall act "in behalf of the city in carrying into execution the plan of the testator," and that the corporation, "acting through its trustees and proper officers, shall be deemed the agent of said city of Fitchburg for the proper execution of all trusts" under Mr. Burbank's will. The Burbank Hospital is to act as the agent of the city of Fitchburg, as in *Drury* v. *Natick*, 10 Allen, 169, and just as another charitable corporation in *Burr* v. *Massachusetts School for the Feeble-Minded*, 197 Mass. 357, was found to have acted for the Commonwealth. We think it plain that the title of the city is not interfered with by the provisions of this statute.

Nor is the statute open to the objections which were found to be fatal to a somewhat similar act in *Cary Library* v. *Bliss*, 151 Mass. 364. As we have already seen, there is no taking of property here, as was the case there. There was no such particular method of administration provided for this charitable trust as was found there. No special persons were designated here to act as individual trustees. This founder was content to have his foundation managed by such officers or agents of the city as might from time to time be lawfully designated for that purpose; and we have already seen that in this Commonwealth the Legislature may, especially with the formally expressed assent of the city by its acceptance of the statute, prescribe who shall be such officers or agents and the mode of their selection. Such

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decisions as *Evansville* v. *State*, 118 Ind. 426, and *State* v. *Denny*, 118 Ind. 449, do not state the law of this Commonwealth.

The argument that the Legislature has attempted in this act to exert a judicial power, contrary to art. 30 of the Declaration of Rights, by removing one trustee and appointing another, fails, because this is neither the intention nor the result of the statute. The city of Fitchburg, as we have seen, retains its legal title to the fund and its position as trustee. As it must act through some instrumentality, the Legislature has provided what it deemed to be a proper one for that purpose; and we of course could not revise that conclusion if we were disposed to do so. We need not consider whether the act would be unconstitutional if it did take away the trusteeship from the city and give it to the Burbank Hospital. *Stone* v. *Charlestown*, 114 Mass. 214, 228, 229. The existence of the conditions which have been imposed by the will upon the city is not of importance. The statute has made no alteration in the rights or liabilities of any one in respect to them. The trust is not affected; the personality of the trustee is not changed. The effect of the conditions remains unchanged. The result of their breach will be the same. The obligation of the city to comply with them, if there is such an obligation, is in no way increased or diminished. As was said in *Drury* v. *Natick*, 10 Allen, 169, already referred to, it is not to be presumed that the city will fail to carry out, to the extent of its legal powers, the wishes of its benefactor.

But the defendant city contends that the Burbank Hospital cannot be regarded as its agent, at any rate against its consent, and without power on its part to revoke the relation; that there cannot be a perpetual agency, or one which, as a mere delegated power, is not strictly subordinate to the control of the principal. As between natural persons who are *sui juris*, this is perfectly true. But the argument overlooks the power of the Legislature to control its cities in their public affairs and in their administration of public charities by controlling the selection of the officers or agents to whom these are to be entrusted. *Smith* v. *Wescott*, 13 L. R. A. 217. *Philadelphia* v. *Fox*, 64 Penn. St. 169. And see *Allen* v. *Macy*, 109 Ind. 559; *McGurn* v. *Board of Education of Chicago*, 133 Ill. 122. It is not necessary for us to determine exactly what are the limits of this legislative

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power, or how far the doctrine laid down in *Park Commissioners* v. *Detroit*, 28 Mich. 228, and *People* v. *Hurlbut*, 24 Mich. 44, should be followed here. See *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509. The acceptance of this statute by the city of Fitchburg makes such a determination immaterial. The act considered in *Grogan* v. *San Francisco*, 18 Cal. 590, had not been accepted by that city.

It results from what has been said that the plaintiffs might safely pay over the funds in their hands either to the city of Fitchburg or to the trustees of the Burbank Hospital. But in view of the fact that since the passage of St. 1890, c. 422, the only effect of a payment to the city would be to cast upon that municipal corporation the duty of paying at once the amount so received to the Burbank Hospital, and as it appears that the hospital has full power to receive the fund and to give to the plaintiffs acquittance and discharge therefor, and so that a payment to the trustees of the hospital is really a payment to the city, while it does not affirmatively appear that there is any officer or any other agent or representative of the city who at present has such power, we are of opinion that the plaintiffs should be instructed that they ought to pay over the trust fund in their hands to the Burbank Hospital as the agent in that behalf of the city of Fitchburg, upon its giving to them proper acquittance and discharge therefor in the name of the city.

So ordered.

COMMONWEALTH *vs.* HERMAN HOLLANDER.

Worcester. September 30, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Pleading, Criminal, Indictment. *Practice, Criminal. Perjury.*

In an indictment for perjury, containing one count charging the defendant with testifying falsely at the trial of a complaint for assaulting a certain person and throwing a stone in a public way in a town, and another count charging the defendant with testifying falsely at the trial of a complaint against the same person for hitting the person, alleged in the first count to have been assaulted, with a stone thrown at him, where there is no allegation that these are different descriptions of the same act, the two counts will be taken to charge separate offenses.

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At the trial of an indictment for perjury containing two counts, respectively charging the defendant with testifying falsely on two different issues at the trial of a complaint in a district court, a request of the defendant for an instruction to the jury, that a certain fact in regard to which the defendant testified in the district court was of no importance for their consideration and "was not material to the issue presented in either count" of the indictment, cannot be granted if the fact was material to the issue raised by one of the two counts.

INDICTMENT FOR PERJURY found and returned in the county of Worcester in January, 1908, as follows:

"The jurors for the Commonwealth aforesaid, on their oath present that Herman Hollander on the thirteenth day of September in the year of our Lord one thousand nine hundred and seven, at Westborough in said county of Worcester, in a proceeding in the course of justice before the First District Court of Eastern Worcester on certain issues within the jurisdiction of said court duly joined, and tried before John W. Slattery, special justice of said court, sitting in the absence of and at the request of the justice, between the said Commonwealth and Carrie M. Sessions, the said Sessions being defendant upon a complaint, duly made to and received by said court was lawfully sworn as a witness.

"Whereupon it became and was material to said issues whether said Sessions did assault Samuel Hollander and throw a stone in a public way of said Westborough, and to this the said Herman did willfully and corruptly testify and say in substance and effect that said Sessions, on first day of September, in the year aforesaid, did assault said Samuel and throw a stone in a public way in said town; all his said testimony as above set forth, being false, as he well knew.

"And the jurors for the Commonwealth aforesaid, on their oath further present that Herman Hollander, on the thirteenth day of September, in the year of our Lord one thousand nine hundred and seven, at Westborough, in said county of Worcester, in a proceeding in the course of justice before the First District Court of Eastern Worcester, on an issue within the jurisdiction of said court, duly joined and tried before said court between the Commonwealth of Massachusetts and Carrie M. Sessions, the said Sessions being defendant upon a criminal complaint made to and received by said court, was lawfully sworn as a witness.

"Whereupon it became and was material to said issue whether

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said Carrie M. Sessions did, on or about the first day of September one thousand nine hundred and seven, at said Westborough, hit one Samuel Hollander with a stone thrown by said Sessions, and to this the said Herman Hollander did [un]lawfully and corruptly testify and say, in substance and effect, that on the first day of September, one thousand nine hundred and seven, he saw said Sessions throw two stones at Samuel Hollander, one of which hit the boy on the leg and left a mark, and that when she threw the stone said Sessions stood in the highway outside of the town pound; all his said testimony, as above set forth, being false as he well knew."

At the trial in the Superior Court before *Wait*, J., the government introduced evidence tending to prove all the necessary allegations contained in each count of the indictment; and further introduced evidence that, at the time when, as testified to by the defendant, Sessions threw the stone, she was standing inside the bars of the pound described in the indictment, and was not at any time outside of the pound or on the highway.

The defendant and his witnesses testified that Sessions threw three stones at Samuel Hollander, one of which hit him in the leg; and that she was standing in the highway at the time she threw them.

At the close of the evidence, the defendant asked the judge to instruct the jury that it was of no importance for them to consider whether or not Sessions was standing in the highway or in the pound at the time of the alleged throwing of the stone or stones; and that it was not material to the issue presented in either count of the indictment where Sessions was standing at the time of the alleged throwing of the stone or stones.

The judge refused to give the instruction requested. The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs.

S. R. Cutler & H. W. James, for the defendant.

G. S. Taft, District Attorney, & *E. I. Morgan*, Assistant District Attorney, for the Commonwealth.

LORING, J. In the case at bar the defendant was indicted for committing two acts of perjury at the trial of a criminal case in the First District Court of Eastern Worcester.

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Seemingly there were two counts in the complaint on trial before the District Court when the prisoner in the case at bar gave the testimony here in question: one for violation of a town ordinance (covered by the first count of the indictment in the case at bar); the other for assault and battery (covered by the second count of the indictment in the case now before us).

That the two counts in the indictment before us are to be taken to charge two offenses, see *Benson* v. *Commonwealth*, 158 Mass. 164; *Commonwealth* v. *Lowrey*, 159 Mass. 62. There is no allegation that they are different descriptions of the same act, as in *Commonwealth* v. *Flagg*, 135 Mass. 545.

It is not stated in terms in the bill of exceptions now before us that the two offenses stated above were on trial in the District Court when the perjury now in question was committed. But what is stated in the bill of exceptions is tantamount to that. It is stated there that the perjury charged in the first count of the indictment in the case at bar was committed in a proceeding in the course of justice before the District Court of Eastern Worcester "on certain issues" then on trial between the Commonwealth and Carrie M. Sessions, where "it became and was material to said issues whether said Sessions did assault Samuel Hollander and throw a stone in a public way of said Westborough"; and that the perjury charged in the second count of the indictment in the case at bar was committed in a proceeding in the cause of justice before the same court "on an issue" then on trial where "it became and was material to said issue whether said Carrie M. Sessions did, on or about the first day of September, one thousand nine hundred and seven, at said Westborough, hit one Samuel Hollander with a stone thrown by said Sessions."

It is also stated in the bill of exceptions that the government introduced evidence tending to prove all the necessary allegations contained in either count.

At the close of the evidence the prisoner asked for the following ruling: "That it was of no importance for them to consider whether or not said Sessions was standing in the highway or in the pound at the time of the alleged throwing of said stone or stones; and that it was not material to the issue presented in either count of said indictment where said Sessions was standing at the time of the alleged throwing of said stone or stones."

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The first part of this ruling plainly applies to the whole case, that is, to both counts. If the fact that Carrie M. Sessions stood in a public way when she threw the stone was material in either of the two counts of the complaint on trial in the District Court, the ruling asked for could not be given.

That is also true of the second part of this ruling asked for by the prisoner. The second part of the ruling is not a request for a ruling as to each count that the fact that the aforesaid Carrie stood in the road was of no importance. The ruling asked for was that this fact was not material to the issue presented "in either count." If that fact was material to one of the two counts the ruling was rightly refused.

The only argument put forward in support of the ruling asked for so far as the first count is concerned is that the ruling asked for deals with the fact "whether or not said Sessions was standing in the highway or in the pound at the alleged throwing of the stone or stones," while the allegation of the indictment is that it was material to the issues on trial to determine "whether said Sessions did . . . throw a stone in a public way." There is nothing in this bill of exceptions to show that the two did not mean the same thing in the trial of the indictment in the case at bar.

Exceptions overruled.

BESSIE CRANDALL & others *vs.* MARGARET AHERN.

Worcester. September 30, 1908. — October 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Trust, Construction. *Deed*. *Husband and Wife*. *Words*, "Their heirs at law."

Land was conveyed by deed to a trustee "to pay over to" his father and mother, "during their joint lives and then to the survivor, during the life of the survivor, the rents and profits, or at their —— allow them to occupy said estate and at the decease of the said survivor convey said premises to their heirs at law." The trustee died in 1874, leaving his father as his only heir at law. The trustee's mother died in 1885, and his father married again and died in 1907. There

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was no issue of the second marriage. Children and grandchildren of the first marriage petitioned to have the title of the land registered, and the second wife of the trustee's father contended that the words "their heirs" in the deed should be construed to mean "his or her heirs" and that she was entitled to an equitable interest as the widow of the trustee's father. The Land Court ruled that the respondent had no equitable interest in the premises. *Held*, that the ruling of the Land Court was correct, since the words "their heirs at law" meant the heirs of both the trustee's father and mother, and not of the survivor of them.

Where the legal title to land is held by a husband in trust for others, it does not descend to his wife as one of his statutory heirs.

PETITION, filed in the Land Court on October 7, 1907, for the registration of certain land in Milford.

There was a hearing before *Davis*, J., who found that the land in question was conveyed in 1878 by one Flagg to Michael H. Ahern in trust, as stated in the opinion; that the trustee died in 1874 leaving his father, David Ahern, as his only heir; that no new trustee ever was appointed; that Ellen Ahern, wife of David, died in 1885, and thereafter David married the respondent Margaret, and died in 1907, leaving her surviving him; that at the time of the filing of the petition there were living children and grandchildren of David and Ellen, who were the petitioners, but that there never was any issue of David by his marriage with the respondent.

The respondent in support of her contention argued that the words "their heirs at law" in the trust deed should be construed to mean "his or her heirs at law"; and that on the death of the trustee the real estate vested in his heir, David, and, on the death of Ellen, merged with the entire equitable estate.

The judge ruled that the respondent had no interest in the premises, and the respondent appealed.

The case was submitted on briefs.

J. B. Ratigan & J. E. Swift, for the respondent.

J. C. Lynch, for the petitioner.

LORING, J. By the terms of the deed under which both plaintiff and defendant claim to be entitled, the trustee was to hold the land in question in trust "to pay over to David Ahern and Ellen Ahern, wife of David, during their joint lives and then to the survivor, during the life of the survivor, the rents and profits, or at their —— allow them to occupy said estate and

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at the decease of the said survivor convey said premises to their heirs at law."

The respondent's contention is that the words "to their heirs at law" are to be construed "to the heirs at law of the survivor." But we see no reason for departing from the meaning of the words used in the deed. The words "their heirs at law" mean the heirs at law of both David and Ellen, and not the heirs at law of either alone. The respondent took no equitable interest under this deed.

It seems to have been conceded by the respondent that she did not take the legal title which came to her husband upon the death of his son, the trustee named in the deed. We are of opinion that where the legal title to land is held by a husband in trust for others it does not descend to his wife as one of his statutory heirs. In such a case R. L. c. 140, § 8, and the rule acted upon in *International Trust Co.* v. *Williams*, 183 Mass. 173, do not apply.

Exceptions overruled.

WILLIAM T. MUNSIE *vs.* SPRINGFIELD BREWERIES COMPANY.

Hampden. September 22, 1908. — October 22, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Master and Servant. Negligence, Employer's liability. *Evidence*, Relevance.

At the trial of an action of tort against one owning and operating a brewery, to recover for personal injuries alleged to have been received by the plaintiff owing to the negligent starting of machinery while the plaintiff was working upon it, it appeared that the machinery was started by an employee of the defendant, who, if the plaintiff also was such an employee, was a fellow servant of the plaintiff. All the evidence tended to show that the plaintiff was employed by one J., and was sent by him to perform certain repairs upon the defendant's machinery, that while making such repairs he took all his directions from the defendant, who could change or stop his work at any moment, that he was paid by J., who rendered a bill to the defendant and included therein a charge for the plaintiff's labor. *Held*, that, when injured, the plaintiff was furnished by J. to work as a servant of the defendant, and was such servant, and therefore could not recover since his injury was due to the negligence of a fellow servant.

At the trial of an action of tort for personal injuries, it appeared that the plaintiff was injured by reason of the negligence of one who, if the plaintiff at the time of the accident was in the employ of the defendant, would have been the plaintiff's fellow servant, and therefore a material question was whether or not at

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the time of the accident the plaintiff was employed by the defendant. There was evidence that the plaintiff was hired by one J., who from time to time sent him to do repair work for various of his customers. The plaintiff offered to show that, the day before the accident, J., after a telephone message from the defendant, ordered the plaintiff to go to the defendant's brewery and make certain repairs. The evidence was excluded, and the plaintiff excepted. *Held*, that the exception must be overruled, since the evidence offered did not tend to show that the plaintiff when injured was not employed in the defendant's business and subject to his control.

TORT for personal injuries received by the plaintiff and alleged to have been caused by the negligent starting of machinery on premises of the defendant. Writ in the Superior Court for the county of Hampden dated May 11, 1907.

There was a trial before *Wait*, J. At the close of the plaintiff's evidence, the presiding judge directed a verdict for the defendant, and the plaintiff alleged exceptions. The facts are stated in the opinion.

N. P. Avery, for the plaintiff.

C. T. Callahan, for the defendant.

KNOWLTON, C. J. There was evidence which would have warranted a finding that the plaintiff was injured through the negligence of the defendant's servant Hogan, and that he himself was in the exercise of due care. The evidence tended to show that the plaintiff was working for the defendant in its business at the time of the accident, and was subject to its control in the work in which he was engaged, and was, therefore, a fellow servant of Hogan. The important question in the case is whether there was evidence that would have warranted a finding that, in doing this work, he was not in the defendant's service. Unless there was such evidence he cannot recover.

It appears that he is a machinist, and has been employed for twenty years by J. and W. Jolly. His work there has been "general repair work, new work and going out to mills doing repairs in mills." Under instructions from his employer he went to the defendant's brewery about February 19, and saw Hogan, the engineer. In the engine room were a steam engine and a number of large machines, with connecting machinery. When he arrived in the engine room he asked Hogan what was the trouble. Hogan replied that he "wanted the piston taken out and the bottom heads — the bottom heads of the cylinder. He

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wanted the piston rods turned down, and the heads bored out and bushed to fit the piston rods." The plaintiff assisted him in taking them out, which work took about two days and a half. These were taken over to the shop of his general employer, and Hogan went over to the shop and had talk with McDonald, the foreman in charge. Later a message was sent by telephone, and new rods were put in the piston heads. Other work was done, and the pistons were afterwards sent to the defendant's brewery. On March 4 the plaintiff had a conversation with McDonald, and, as a result, took his tools and went to the brewery, passed into the engine room and asked Hogan what was the matter. Hogan told him that the piston rods were left too full on the top side of the piston head. He said that would not do, because it came in contact with the cylinder head. The plaintiff said that could be fixed, and chipped them off and filed them, which work took two hours and a half or three hours. When this was done he inquired of Hogan whether that was all he was to do. Hogan replied: "No, I want you to stay here and help me to put them in." When he stopped work at the end of the day, he asked Hogan whether he should come back and finish it. Hogan said: "Yes, you had better stay and finish your job up." He came back the next day and worked with Hogan cleaning valve seats, and doing different kinds of work about the machinery in getting it ready for use. Hogan himself cleaned the valves, and he told the plaintiff to clean the valve seats. While he was cleaning the valve seats the engine was started and this caused the injury. The plaintiff testified that, as the work progressed from time to time, he followed Hogan's orders and directions. This testimony was undisputed, and was confirmed by other witnesses. McDonald testified that it was the custom of J. and W. Jolly's men, employed in this way, to make their own entries in the time books or time records. It appeared that J. and W. Jolly rendered a bill which was paid by the defendant, and which included a charge for the plaintiff's labor.

All the evidence tends to show that the plaintiff was furnished by his employer to work as a servant of the defendant, and there is no evidence that has any tendency to show that he was there in any other relation. He was employed at the time of the accident in the defendant's business, of which the defendant as proprie-

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tor had complete control. While there he took all his directions from the defendant, through Hogan, the engineer, and the defendant could change or stop his work at any moment. Although he was paid by J. and W. Jolly, he consented for the time, at the request of his employer, to enter the service of the defendant, and to become while there a fellow servant with Hogan. The law covering the case is well settled by numerous decisions in this Commonwealth. *Delory* v. *Blodgett*, 185 Mass. 126, and cases cited. *Haskell* v. *Boston District Messenger Co.* 190 Mass. 189, 193.

The plaintiff's exception to the exclusion of testimony must be overruled.* There was no offer to prove, by the excluded testimony, anything tending to show that the plaintiff was not employed in the defendant's business, and was not subject to its control at the time of the accident.

Exceptions overruled.

BLACKSTONE MANUFACTURING COMPANY *vs.* INHABITANTS OF BLACKSTONE.

Worcester. September 28, 1908. — October 22, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Water Rights. Tax, Assessment, Abatement. *Conflict of Laws.*

Discussion by KNOWLTON, C. J., of the development and the present condition of the law in this Commonwealth with regard to mill privileges.

A Rhode Island corporation erected in Massachusetts a dam across the Blackstone River and constructed in connection therewith, upon land owned by it, canals, ponds and trenches in the town of Blackstone, but, without making any application of the water power in this Commonwealth, carried the water in a trench with a slight fall into Rhode Island, where it was used in a power house to generate electricity with which to run a mill in that State. This was the most valuable use to which the property in Blackstone could be put. The assessors of Blackstone taxed such of the property of the corporation as was in that town, including the dam, the pond, the canals and the trench, in reference to its value

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* The plaintiff offered to show that his foreman at J. and W. Jolly's, after a telephone message from the defendant's brewery, ordered the plaintiff, on the morning of the day before he was injured, to go over to the brewery and put in the pistons.

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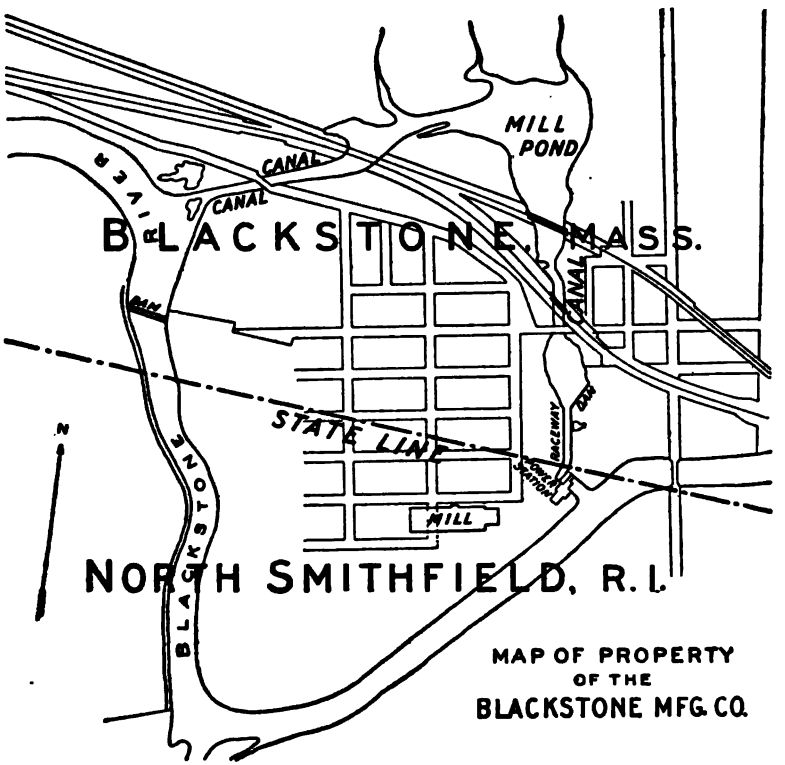
as a means of furnishing power at the corporation's power house in Rhode Island, and the corporation petitioned to have the tax abated. *Held*, that it would have been improper to tax the value of the use of the power in Rhode Island separately as water power existing and applied there, but that the land owned by the corporation in Blackstone should be taxed there with all its elements of value, so much of the value of the water power in Rhode Island as was imputable to the real estate in Blackstone being considered, as well as the uses to which the power could be put in Blackstone.

A list of a taxpayer's estate liable to taxation, intended in good faith to be filed in accordance with R. L. c. 12, § 41, entitles the taxpayer to be heard upon a question of abatement under § 74, although the list contains unintentional omissions and inaccuracies.

PETITION, filed in the Superior Court for the county of Worcester, October 1, 1906, for an abatement of a tax assessed to the petitioner by the respondent for 1905.

The case was referred to an auditor. His findings of fact are stated in substance in the opinion. Annexed to his report was the following plan.



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The following is in substance the auditor's statement of the contentions of the parties and of his rulings:

"The respondent contends and I rule in accordance with such contention that the dam, the canals, the pond and so much of the trench as lies in Massachusetts, together with the remainder of the trench, the fall and wheels which lie in Rhode Island, with the water of the river and the right to use it, constitute together a single unit which may be described as a 'privilege.'

"With respect to this privilege, however, the petitioner contends and asks me to rule (a) that on the foregoing facts there is no 'privilege' in Blackstone which is there taxable, (b) that the dam, canals, pond, trench, fall, and the water of the river constitute a water power which has been annexed by its owner to the mills in Rhode Island and can only be taxed there, (c) that any value which any of said structures or land occupied by them for ponds, canals, etc., may have is purely due to them as component parts of the system by which the water power in Rhode Island is developed and is to be referred to the mills and land in Rhode Island and is there taxable, (d) that the value of said dam and other structures and the canals and ponds is merely nominal if referred to that part of the company's real estate which lies in Massachusetts.

"The respondents contend, however, that its assessors had the right to tax so much of said unit (consisting of dam, canals, pond, and a part of said trench as lay within the town of Blackstone) as a part of its assessment upon 'village land and privilege including dam . . . for the development of water power sixty-one and three-eighths acres' at their proportionate fair cash value, having reference to the use made of them by the petitioner in creating and producing power in Rhode Island and having reference to the fair cash value of the entire unit (i. e. the entire privilege), as used in Rhode Island, and that in arriving at this value I should take into consideration the enhanced value, if any, which the structures have by reason of their constituting a part of a privilege developing a valuable water power.

"I refused to rule as requested by either party and rule that there is no complete 'privilege' in Massachusetts, taxable in Blackstone, that under the description adopted by the assessors, namely, 'village land and privilege including dam . . . for the

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development of water power sixty-one and three-eighths acres,' said land, etc., is to be taxed at its fair cash value with reference to all the buildings thereon and in use together and having regard to and including the value of the dam, the canals, the pond, and so much of the trench as lies in Massachusetts with reference to their capacity for valuable use, not as component parts of a unit system developing power on the company's wheels in Rhode Island, and not assigning any value to them attributable to the water power actually developed on said wheels or to the money value of said water power either for use by the owner of the Rhode Island mills or for sale to others by said owner and not dependent upon or including any part of such value."

There was a hearing before *Gaskill*, J., without a jury, upon the pleadings and the auditor's report, and he *pro forma* adopted the findings of fact and rulings of law of the auditor, and reported the case for determination by this court.

T. H. Gage, Jr., (*F. F. Dresser* with him,) for the petitioner.

J. R. Thayer, (*H. H. Thayer* with him,) for the respondent.

KNOWLTON, C. J. The petitioner is a manufacturing corporation organized under the laws of the State of Rhode Island more than sixty-five years ago. Previous to August, 1904, its mills were situated in the town of Blackstone, Massachusetts, where it owned more than two hundred and fifty acres of land, which included village lots, so called, to the amount of more than sixty acres, together with a dam, canals, pond, trench and fall which constituted a valuable water privilege upon the Blackstone River that furnished power for the mills. There were dwelling houses and other buildings upon this land, about which no question arises. In 1904 a new mill was constructed in Rhode Island, a few hundred feet from the mill yard containing the old mills. A new concrete trench was extended about twenty feet into Rhode Island, at the terminus of which gates were constructed that controlled the flow of water to five water wheels by which electric power was generated and transmitted to the new mill for the operation of its machinery. The gates, the wheels, the power house and about twenty feet of the trench were in Rhode Island, and the water which produced the power was all applied to the wheels in Rhode Island. At the dam the fall was fifteen feet, at the old mill yard it was twenty-nine feet

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and at the new power house it was thirty-two feet. The assessors of the town of Blackstone taxed the property in that town, including the dam, the pond, the canals and the trench, in reference to its value as a means of furnishing power, not only at the old mills, but also at the petitioner's new power house across the State line in Rhode Island. The petitioner contends that the power is annexed to its mill in Rhode Island, and that the corporation is not taxable in Massachusetts for any value in the land or water or structures, by reason of their use or their adaptability to use as a means of furnishing power to run the mill. The principal question before us is, Where and on what principles is this property taxable?

The petitioner rests its contention largely upon the case of *Boston Manuf. Co.* v. *Newton*, 22 Pick. 22, the doctrine of which is stated in the headnote as follows: "Water power for mill purposes, not used, being merely a capacity of land for a certain mode of improvement, cannot be taxed independently of the land." The remainder of the headnote is in these words: "Where a dam extended across a river, the thread of which was the dividing line between two towns, but the water power created thereby was applied exclusively to drive mills situated in one of the towns, it was held that the water power was not subject to taxation in the other town." The opinion in the case is less than half a page in length. It barely states the proposition with which the headnote begins, and adds that the power had been annexed to the mills, which were situated wholly in the town of Waltham, and that it could not be taxed in Newton, in which were the land and water to the thread of the stream on the other side. This case has been treated as settling the law in Massachusetts that the possibility of deriving power from the water of a stream, before the water is appropriated or used for furnishing power, is not taxable property by itself alone, and that when water is appropriated and used for power, it is, as between different owners and municipalities, taxed with the property to which it is applied.

It is to be noticed in this case that the water power is dealt with only in connection with an attempt to tax it as a distinct subject, apart from the land in Newton over which the water flowed, and from the part of the dam which was in that town.

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The tax upon the dam, as well as that upon the land, was held to be rightly assessed. In *Pingree* v. *County Commissioners*, 102 Mass. 76, a tax upon a dam and land in Windsor, used to make a reservoir to furnish power for mills in Dalton and Pittsfield, was held rightly assessed in Windsor on their value for use in producing the power.

The reasons for the decision in the case first mentioned, although they are not stated in the opinion, are found in legislation relative to the erection of mills, which has been in force in Massachusetts from the early colonial times. R. L. c. 196. Massachusetts and other New England States are generally a hilly, and in some parts a mountainous region, diversified with numerous streams of water, which often have a great fall in running a short distance, and furnish frequent opportunities for the use of water power in a variety of industries. In the early days these opportunities were far more numerous than the persons who were in such circumstances that they could profitably use them. It was for the interest of their owners and of the general public that the use of them should be encouraged by legislation. To make the head and fall available in the best way, the use of the stream beyond the limits of the riparian ownership of the projector of a mill was commonly necessary. In most cases, property rights of an individual owner would not enable him to control a valuable water power, without interference with similar rights of an upper or lower riparian owner. In view of the great amount of property of this kind that could not be used to the best advantage without legislative regulation, the Mill Act was passed. It did not attempt to take property by the right of eminent domain, but to control and regulate the exercise of common rights for the common good. The common right of every proprietor to use water by a dam, for the production of power at a mill, was treated by the statute as a mere potentiality until it was exercised. It was not treated as having ripened into property which could not be interfered with by another riparian owner in the exercise, on his own land, of his similar right. He who first appropriated a stream to such a use was treated as thus becoming the owner of the property included in his appropriation, which then first came into existence as a useful agent. The power so appropriated became property annexed to the

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estate with which it was used, and the owner's only liability was to make compensation to any other person whose property was damaged by the use. Water power as a distinct element of value that could be taxed apart from the land, or that must be paid for as between different riparian proprietors, was recognized only in connection with the property to which it was annexed by the structures and appropriation with which it was applied to the mill.

The nature of this legislation, in reference to the purpose of its authors and to the constitutional questions that arose under it, has been fully considered by the courts. *Lowell* v. *Boston*, 111 Mass. 454, 464, 467. *Turner* v. *Nye*, 154 Mass. 579, 582. *Otis Co.* v. *Ludlow Manuf. Co.*, 186 Mass. 89, 95. While originally there was some doubt as to the grounds on which it could be sustained under the constitution, it is now settled by this court and by a unanimous decision of the Supreme Court of the United States, that the validity of the legislation does not depend upon the right of eminent domain, but upon the right of the Legislature to regulate the use of property for the best interests of the owners and of the public, when different persons have separate rights which have a common relation to certain property, such that a use of it by one owner will interfere with a like use by another owner. Besides the cases above cited, see *Head* v. *Amoskeag Manuf. Co.* 113 U. S. 9, and cases cited in the opinion. The same principle, with variations, is applied to legislation on other subjects. *Wurts* v. *Hoagland*, 114 U. S. 606. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 163. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349. *Georgia* v. *Tennessee Copper Co.* 206 U. S. 230.

Under our Mill Act, in determining rights as between different riparian proprietors or different towns in this Commonwealth, the decision in *Boston Manuf. Co.* v. *Newton*, *ubi supra*, followed naturally. But that act does not affect property in another State except in a particular immaterial to this case. See St. 1905, c. 259. It adjusts rights in the flow of water through a stream in which all riparian proprietors have an ownership. It does not assume to give or take away property or rights in property beyond the boundaries of the Commonwealth, within which alone our Legislature has jurisdiction. It does not bring into

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this Commonwealth for taxation interests in real property situated in another State, and it does not transfer from this to a neighboring state valuable rights in real property situated in Massachusetts. In determining what rights of property are taxable in Massachusetts under the conditions that exist in this case, we are not to consider a statute enacted merely to regulate the rights of riparian owners to property in our own jurisdiction.

From this point of view, the question before us is, What is the value of the petitioner's property, having reference to any and all of the uses to which it is adapted? The land of the petitioner, through which the river flows in Massachusetts, descends along the line of the stream in such a way as to give an opportunity to create a valuable water power. The flow of the water and the fall are natural elements of value in the real estate, which would be taken into account as between buyer and seller in agreeing upon a price for the property, and by assessors in fixing its value for taxation. The dam, canals, and other structures have been constructed to make these natural features of the real estate valuable. They are all to be considered together, in connection with the land and the flow of the stream, in determining what the whole is worth. They have all been appropriated and put to use in furnishing water power as a part of a unit which constitutes the petitioner's mill privilege, and which includes about twenty feet in length of trench and nearly three feet in height of fall in Rhode Island, before reaching the place where the power is applied to the wheels. If conditions in Rhode Island were disregarded, the value of the property in Massachusetts, including with the land and water the fall which the land furnishes, and the dam, pond, canals and other appurtenances, would be estimated in reference to the most profitable uses to which it could be put, and especially its use to furnish power to a mill in Massachusetts, situated near the line of the State of Rhode Island. Inasmuch as it has been joined to the property in Rhode Island and used with the slight additional fall there to produce a single unit of water power, and inasmuch as it is found that this is the most valuable use to which it can be put, there is no reason why its value should not be considered in reference to the use to which it is adapted, and which is now made of it in connection with the property in the other State.

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The State of Maine was formerly a part of Massachusetts, and its statutes and decisions are very similar to those of the parent Commonwealth. In *Union Water Power Co.* v. *Auburn*, 90 Maine, 60, the decision in *Boston Manuf. Co.* v. *Newton*, 22 Pick. 22, was followed, although Mr. Justice Emery wrote an able dissenting opinion. In *Saco Water Power Co.* v. *Buxton*, 98 Maine, 295, and *Penobscot Chemical Fibre Co.* v. *Bradley*, 99 Maine, 263, it was held that, while water power as a distinct subject for taxation could not be assessed except in connection with the property with which it was used, the land and fall and dam were properly assessable in reference to their value as a means of producing power. In the first of these two cases this language was used in the opinion: "We think that in so far as this land was made more valuable by the stream and fall, so far these were properly to be considered in the valuation of the land. . . . It was the land and the dam, situated as they were, with a capacity to hold the water of the stream and to create power. By the terms of the assessment water power was not assessed and the water was not assessed. The 'privilege was assessed.' Its value might be greatly enhanced by the existence of the water and the means of creating the power." In *Bellows Falls Canal Co.* v. *Rockingham*, 37 Vt. 622, the assessment was upheld, and there is nothing in the opinion that conflicts with our view. In none of these cases was there any occasion to consider the law to be applied where the pond, the head, and the fall which produced the power were all or nearly all in one State, and the power was applied to the wheel in an adjoining State.

In New Hampshire the subject has been considered on general principles, seemingly without reference to the Mill Acts, and it is held broadly that the elements in the real estate which create the power are to be treated as creating its value, and that the whole is to be assessed in the town where these are situated, without reference to the location of the mill where the power is applied. *Cocheco Manuf. Co.* v. *Strafford*, 51 N. H. 455. *Winnepiseogee L. C. & W. Manuf. Co.* v. *Gilford*, 64 N. H. 337. *Amoskeag Manuf. Co.* v. *Concord*, 66 N. H. 562. These cases strongly sustain the conclusion which we have reached in the present case. So too does *Quinebaug Reservoir Co.* v. *Union*, 73 Conn. 294.

The only case that we have discovered in Massachusetts which

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relates to the damming of water in this State, to be used at a mill or mills in another State, is *Farmington* v. *County Commissioners*, 112 Mass. 206. In that case the taxation in Massachusetts was upheld without much discussion of the reasons, other than those founded on the pleadings, although it appeared that the valuation of the reservoir and dam was a considerable sum, fixed in reference to their value for holding back water for the production of power which was nearly all owned and used in Connecticut. A part of the evidence objected to was held "competent to show the value of the reservoir by reason of its capacity for valuable use."

We have been referred to no case in which elements of value in real property existing in one State were left untaxed there, and were taxed in an adjacent State where they were put to use.

Suppose the owner of land in a neighboring State should purchase a right in land in this State, covering most of its value for use, and leaving the fee of the land unpurchased and almost worthless, and should attempt to annex it as an easement to his land in the other State, would he thereby deprive this Commonwealth of the right to subject the whole land in Massachusetts, including the purchased right, to taxation? Plainly not. If the authorities of the neighboring State should assume to tax the supposed easement in the land in Massachusetts, and to enforce the collection of the tax by a sale, on what principle could they conduct a sale of the easement in Massachusetts and create a title here under laws enacted only for their own jurisdiction? In the case supposed, the whole property in this Commonwealth would be taxable to the general owner, or to the person in possession. It would not be the duty of the assessors to attempt to discover what interests or estates had been carved out of it. If the collection of the tax was enforced by a sale of the property, the whole would be sold, including outstanding easements, and the purchaser would acquire a perfect title, subject only to redemption by any owner having an interest in it. *Hunt* v. *Boston*, 188 Mass. 308. *Abbott* v. *Frost*, 185 Mass. 398. *McLoud* v. *Mackie*, 175 Mass. 355.

Previous to the enactment of St. 1905, c. 198, which is not applicable to the present case, this was the law as to taxes upon

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real estate and sales for the collection of taxes when there were easements upon the taxed property or easements annexed to it, and when both the dominant and servient tenements were within the Commonwealth. This statute changes the law as to easements in such cases; but it has no application to taxation or the collection of taxes upon property near the boundary line of the State, when a beneficial use of land in one of the States is made in connection with land in the other State. Its enforcement in reference to such property would be impossible.

In the present case no easement has been created, but the land is held, with its appurtenances and all its natural qualities, by a single owner. It should be taxed to the petitioner, with all its elements of value. Among these are the right to use the flow of the water in connection with the fall of the stream to produce power, and to sell it for that purpose, either to be used in Massachusetts or to be carried into Rhode Island and used with an additional fall there. The use in Rhode Island is not to be taxed separately, as water power existing and applied there, but all the elements and qualities of the real estate which unite to produce the water power in Rhode Island and which combine to give it value there are to be considered. In determining the value of these features of the real estate in Massachusetts, the uses to which power could be put in Blackstone are to be considered, and the uses to which it is put in connection with the additional fall and the structures in Rhode Island are to be regarded. *Lowell* v. *County Commissioners*, 152 Mass. 372.

If the value of all such elements, those in Rhode Island, as well as those in Massachusetts, which combine to produce the entire water power at the wheels is ascertained, the inquiry will then be, what part of this value is imputable to the real estate in Massachusetts. The answer to such an inquiry would be in part an estimate, but it would not be unlike estimates that are frequently made in determining the rights of parties. Such estimates have sometimes involved an apportionment, for taxation between different States, of the values of property extending into two or more States and used as a single system under one ownership. *Kingsbury* v. *Chapin*, 196 Mass. 533. *Cleveland, Cincinnati, Chicago & St. Louis Railway* v. *Backus*, 154 U. S.

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439, 445, 446, 447. *Western Union Telegraph Co.* v. *Attorney General*, 125 U. S. 530. *Massachusetts* v. *Western Union Telegraph Co.* 141 U. S. 40. *Taylor* v. *Secor*, 92 U. S. 575.

We are of opinion, under the facts found by the auditor, that the list * filed by the petitioner was sufficient to entitle it to file a petition for an abatement. The list was filed in good faith, and the only important omission in it is found to have been made innocently. *Great Barrington* v. *County Commissioners*, 112 Mass. 218.

The findings of the Superior Court should be set aside, and the value of the property in question should be determined, either by a recommittal to the auditor or otherwise, in reference to any and all uses to which it is adapted, including the furnishing of power to be used on the petitioner's wheels in Rhode Island.

So ordered.

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* With regard to this matter, the auditor reported: "The petitioner was a foreign corporation and there was no evidence before me that the assessors required such corporations to bring in lists of the real estate in the manner provided by statute. It did so, however, and included in or annexed to said list the following statement: 'The Blackstone Manufacturing Company makes this statement of its taxable property in the Commonwealth of Massachusetts, not admitting that the real estate as listed is actually worth the sum of $153,020 but for the purpose of arriving at an amicable arrangement with the assessors of taxes of Blackstone for the year 1905.' The respondent asked me to rule that 'the petitioner has not presented to the assessors of the town of Blackstone a list of its taxable property in accordance with the provisions of R. L. c. 12, and it is not entitled to an abatement in these proceedings.' I refused so to rule and ruled that the list filed by the petitioner with the assessors was in substantial compliance with the statute and that it was not thereby deprived of the right to an abatement in these proceedings if otherwise entitled thereto.

"It was also suggested by the respondent in argument that the petitioner had failed to include in said list property for which it was properly taxable in Massachusetts, and the instruction prayed for is broad enough to cover this objection raised in argument. Whether or not it has so failed to include in said list property for which it is properly taxable depends upon whether or not the assessors had the right to tax the canal, pond and structures used by the petitioner in creating power under the circumstances hereinafter set forth, but, if they had such right, and if as a result any item of taxable property belonging to the petitioner was omitted from its tax list, I find that the same was honestly omitted in the belief that it was not taxable by the town of Blackstone."

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LOUISE S. HOLBROOK *vs.* SELECTMEN OF DOUGLAS & others.

Worcester. September 29, 1908. — October 22, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Way, Relocation, Alteration. *Municipal Corporations*, Officers and agents.

A petition, presented to the selectmen of a town which had not accepted R. L. c. 48, §§ 58–61, averred that "common convenience and necessity require the relocation of a certain way or road in said town . . . for the purpose of establishing the boundary lines of said road or way, and making needed alterations in the location, grade, course and width thereof." The prayer of the petition was that the selectmen "proceed to relocate and lay out . . . and to establish the boundary lines of said way and to fix the grades thereof." In their order on the petition, made in 1905, the selectmen described it as a petition "for the relocation or alteration of the" way, and stated that they had "altered" the way "so that the course thereof as altered, shall follow" a certain course, "which location as now altered is as follows," describing it and giving the lines of a location of the way as laid out by the selectmen of the town in 1787. *Held*, that the action sought by the petition and taken by the order of the selectmen was intended to be, not an alteration of the way under R. L. c. 48, § 65, but a relocation, which the selectmen had no power to order, the town not having accepted §§ 58–61 of that chapter.

BILL IN EQUITY, filed in the Superior Court for the county of Worcester, August 29, 1905, seeking to prevent the establishment or construction of a way, which, the bill alleged, the defendants undertook to relocate or lay out.

There was a hearing before *Stevens*, J., on facts which were agreed to, and he dismissed the bill. The plaintiff appealed. The facts are stated in the opinion.

The case was submitted on briefs.

H. Parker, *C. C. Milton & F. L. Riley*, for the plaintiff.

E. H. Vaughan, *F. J. Libby & J. Clark, Jr.*, for the defendants.

KNOWLTON, C. J. The plaintiff by this bill seeks to obtain an injunction against the selectmen of Douglas, to prevent the establishment or construction of an alleged way which, by their act, afterwards accepted by a vote of the town, they undertook to relocate or lay out.

The record and the briefs upon which the case was argued leave us in doubt as to some of the facts that may affect the

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merits of the case. It is agreed that the land included within the alleged way is the same over which a town way was laid out by the selectmen of Douglas in 1787, as appears by the records of the town in book 12, page 76. It is also agreed that in the same year the town of Douglas became the owner of this land by a deed from one Hill. These facts tend to show that the plaintiff has no standing here upon her application for an injunction. It is also agreed that on April 30, 1902, the county commissioners, upon a petition, relocated this way. There is nothing to show the lines of their location except a stone monument erected by them in one of the side lines, which appears to be about a foot from the line that the defendants laid down in their order of relocation. The authorities did not take possession of the land for the purpose of constructing or altering the way within two years after the right to take possession under the order of the county commissioners accrued, and it seems to be assumed by the parties that the R. L. c. 48, § 92, which renders the original location void as against the landowner when possession is not taken within two years, is applicable to the case of a mere relocation of a previously existing way. Whether this assumption is correct is a question not raised or argued by either party, and we need not consider it. The averment in the bill that the plaintiff is the owner of lands over which the defendants assumed to lay out and establish a way by relocation and alteration is admitted in the answer, and both parties have treated the case as turning on the validity or invalidity of the action of the defendants and the town upon the petition for a relocation. Indeed, the defendants say in their brief: "The case presents one legal question, Was Cummings Court lawfully altered or relocated in 1905?" We shall, therefore, confine ourselves to a consideration of this question, assuming that there are facts undisclosed which make the answer to it decisive of the case.

It is plain that a relocation of the way under the R. L. c. 48, § 12, is a different proceeding in law from an alteration of a way under § 1 or § 65 of the same chapter, although a relocation may sometimes include an alteration in the course or width of the way, and an alteration under § 1 or § 65 may sometimes involve, at least in part, a kind of relocation. In *Worcester* v. *County Commissioners*, 167 Mass. 565, 568, it is said by Chief

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Justice Field, in his dissenting opinion, that "Town ways can be located anew only by county commissioners. Selectmen can only lay out or alter town ways and private ways and make specific repairs on such ways." This is in accordance with the statutes. R. L. c. 48, §§ 12, 65. The jurisdiction of selectmen to relocate highways under the R. L. c. 48, § 58, exists only in those towns which have accepted §§ 58–61 of this chapter. The town of Douglas had not accepted these sections.

To determine the nature of the proceedings in this case we look first at the petition, upon which alone the jurisdiction of the defendants was founded. Its first averment is that "Common convenience and necessity require the relocation of a certain way or road in said town," which is followed by a description of the road. Then follow the words, "for the purpose of establishing the boundary lines of said road or way, and making needed alterations in the location, grade, course and width thereof." This states the purpose of the relocation in substantially the language of the statute giving jurisdiction to relocate ways. R. L. c. 48, § 12. It plainly indicates a purpose to have the selectmen take such proceedings as may be taken by county commissioners under that section, and as may be taken by selectmen in regard to highways if §§ 58–61 have been accepted by the town. The prayer of the petition is that the selectmen "proceed to relocate and lay out said way, and to establish the boundary lines of said way, and to fix the grades thereof." This again looks to relocation and establishing the boundary lines as the substance of that which is to be done.

We are of opinion that this petition on its face purported to call for a statutory relocation of the way, and not for a statutory alteration of the way, and that the selectmen had no jurisdiction to grant it, or to take action of a different kind under it.

If we look at the final order of the selectmen upon the petition, we find that they describe it as a petition "for the relocation or alteration of the town way known as Cummings Court." They then go on to say that they have altered the "way or court so that the course thereof as altered shall follow the original course of said way as laid out in 1787 and recorded in book 2, page 78 of the town records, which location as now altered is as follows." Then they give the easterly line and the westerly line, each of

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which follows the line of the old location. Although they used the word "alter," the only thing which they did in regard to the way, as disclosed by their record, was to relocate and establish the boundaries of the way according to its original location. If this was in fact an alteration of the way in any part, there is nothing in their record to indicate it, except the use of the words alter and alteration. It would seem to be merely an establishing of the boundaries of the way, in accordance with the lines of the original location. They make no reference to the previous relocation by the county commissioners, one line of which, at one point, appears by the plan to be about a foot from the line established by the defendants. They say that they award no damages, because the land over which the way passes was originally acquired by the town by purchase. There is nothing in the record to indicate that what they did was, or was intended to be, in substance, such an alteration as is contemplated by the R. L. c. 48, § 65, or anything more than a relocation for the purpose of establishing the boundary lines. We are therefore of opinion that their action was unauthorized by the statute, and it becomes unnecessary to consider whether the subsequent town meeting was legally warned. There is nothing in *Bennett* v. *Wellesley*, 189 Mass. 308, in conflict with this view.

We are of opinion that an injunction should be issued against the defendants, to prevent them from entering upon the plaintiff's property for the purpose of establishing or constructing the way under the order of August 12, 1905, and the subsequent vote of the town accepting the act of relocation.

So ordered.

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CHARLES M. THAYER, executor, *vs.* JAMES P. PAULDING & others.

Worcester. September 29, 1908. — October 22, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Devise and Legacy, Specific or general.

The will of one, who, at the time it was made and at the time of his death, owned three hundred seventy-five shares of the capital stock of a certain corporation, contained the following provision: "I give and bequeath to my steadfast friend . . . [P] . . . one hundred twenty-five shares of the capital stock of . . . [the corporation] . . . together with all the rights and privileges which now or hereafter appertain to the same." Within a year after the death of the testator, dividends were declared and paid upon the three hundred seventy-five shares of stock in the hands of the executor and the portion thereof corresponding to the one hundred twenty-five shares was $825. The executor brought a bill in equity for instructions as to whether or not such $825 should be paid to P. *Held*, that the $825 should be paid to P., since the words, "together with all the rights and privileges which now or hereafter appertain to the same," indicated that the testator meant the legacy to be specific, and required that the one hundred twenty-five shares of stock should be set apart and, at the end of a year from the testator's death, should be turned over to the legatee with any increment which had accrued upon them after the testator's death.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Worcester January 25, 1907, by the executor of the will of Edward Greene, late of Worcester, alleging that, at the time of his death the testator owned three hundred seventy-five shares of the capital stock of the Rand Drill Company, that, within a year after the death of the testator, such dividends had been paid upon such stock that the amount which had been paid as dividends on one hundred twenty-five shares was $825.16, that the will contained the following clause: "I give and bequeath to my steadfast friend James P. Paulding, of 10 West 10th Street in the City of New York, if he is living at the date of my death, one hundred twenty-five (125) shares of the capital stock of the Rand Drill Company of New York, a corporation having a usual place of business in Mt. Pleasant in the State of New York, together with all the rights and privileges which may now or hereafter appertain to the same." The bill prayed for instructions as to whether any part or the whole of the $825.16 should be paid to James P. Paulding.

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There was a hearing before *Rugg*, J., who reserved the case for determination by the full court. The facts are stated in the opinion.

The case was submitted on briefs.

R. B. Dodge & W. J. Taft, for the defendant Paulding.

J. O. Sibley, for the residuary legatees.

KNOWLTON, C. J. In the will of Edward Greene there is a legacy to James P. Paulding of "one hundred and twenty-five shares of the capital stock of the Rand Drill Company of New York, a corporation, . . . together with all the rights and privileges which may now or hereafter appertain to the same." Within less than one year after the death of the testator, dividends on this stock amounting to $825.16 were paid to the plaintiff as executor, and the question presented is whether these dividends should be paid to the legatee, or used as a part of the general funds of the estate. This involves the question whether the gift of this amount of stock is a specific legacy or a general legacy. If it is a specific legacy, it covers this number of shares of stock held by the testator at the time of making his will, together with all their accretions from the time of his death to the time when the legacy should be turned over by the executor to the legatee, namely, to the expiration of one year from the time of the testator's death. If it is a specific legacy, there would have been an ademption of it which would have left the legatee with nothing, if the particular property had ceased to exist, or been disposed of by the testator in his lifetime. On the other hand, if it is a general legacy, it gave the legatee a right which vested on the death of the testator to have this number of shares delivered to him by the executor at the expiration of a year from the death of the testator, and this right had no reference to any particular shares. If a testator making such a gift had no such shares at the time of his death, or if he had them and for any reason the executor saw fit to sell them soon afterward, in the settlement of the estate, it would be the executor's duty to procure them by purchase before the expiration of a year from the time of the testator's death and then to deliver them to the legatee. Such procurement and delivery would satisfy the requirements of the will. *Johnson* v. *Goss*, 128 Mass. 433, 436.

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It is agreed by the parties that at the time of the execution of his will the testator owned three hundred and seventy-five shares of this stock, and continued to own them to the time of his death. If we consider that part of the language which purports only to give the stock, disregarding the words "together with, etc.," we think it plain on the authorities that they did not create a specific legacy. The number given was only a part of a larger number of shares that the testator owned. See *White* v. *Winchester*, 6 Pick. 47, 52. There was no specification of what part, otherwise than by the quantity. There is no designation, such as the use of the word "my," to confine the gift to any particular shares. *Johnson* v. *Goss*, 128 Mass. 433, 436. *Slade* v. *Talbot*, 182 Mass. 256. *Harvard Unitarian Society* v. *Tufts*, 151 Mass. 76. *Foote, appellant*, 22 Pick. 299. *Tomlinson* v. *Bury*, 145 Mass. 346. There is no bequest to the same legatee of both stock and money, such as sometimes has been much relied upon as showing an intention to make the legacy specific. See *Metcalf* v. *Framingham Parish*, 128 Mass. 370. See upon the general subject, *Tifft* v. *Porter*, 8 N. Y. 516; *Sponsler's appeal*, 107 Penn. St. 95. See *Snyder's estate*, 217 Penn. St. 71; *Dryden* v. *Owings*, 49 Md. 356; *Davis* v. *Cain*, 36 N. C. 304.

If this is to be treated as a general legacy, the question arises whether the words, "together with all the rights and privileges which may now or hereafter appertain to the same," enlarge the gift. We have already referred to the rule that an ordinary legacy is not payable until the expiration of a year from the time of the testator's death, and if the legacy is of money, no interest is payable upon it for that time, even if it is invested and interest upon it is received. *Kent* v. *Dunham*, 106 Mass. 586. *Ogden* v. *Pattee*, 149 Mass. 82. *Welch* v. *Adams*, 152 Mass. 74, 87. In the case of a mere general legacy of stocks, since a purchase by the executor and delivery to the legatee of the requisite number of shares at the end of the year would satisfy the requirements of the will, he would not be called upon to procure or pay over dividends previously declared and paid to the owner. In reference to such a general legacy the words above quoted from the will would add nothing. They would be nothing more than a tautological and unnecessary statement, meaning that the stock should be perfect in its qualities as stock,

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without impairment in any way, and conveyed by a perfect title to give the legatee all the advantages that could belong to any owner. The words are more pertinent to a gift of a specific legacy than to a gift of a general legacy, although a gift of a specific legacy without these words would include all rights and privileges pertaining to the specific thing given, which accrued or existed after the death of the testator. They seem to point to some particular stock in the mind of the testator, referred to by the words "the same."

We regard the question, whether this last clause is sufficient to change what would otherwise be a general legacy into a specific legacy, as the only difficult question in the case. A very slight indication of an intention to give shares then in his ownership is enough to make the legacy specific in a case like this. On the whole, we think the words should be considered as referring to this number of shares of the stock then owned by the testator, and as requiring that they be set apart and, at the end of the year, turned over to the legatee with any increment accruing from them after the testator's death. All the language of the will should be considered together and given effect. We are of opinion that the testator intended by this clause to give a specific legacy. The dividends are to be paid to James P. Paulding.

So ordered.

HATTIE CRAIG *vs.* INHABITANTS OF LEOMINSTER.

Worcester. September 29, 1908. — October 22, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Way, Defect in highway.

At the trial of an action against a town under R. L. c. 51, § 18, to recover for personal injuries alleged to have been received by the plaintiff by reason of a defect in the highway, there was evidence tending to show that a building was being moved on the highway in question by one who rightfully was on the highway for that purpose, that, in the process of moving, a rope was attached to the building and extended along and about eighteen inches above the surface of the street from the building across a crosswalk to a capstan, that, during the evening when the plaintiff was injured, the moving was interrupted while some overhead wires, which obstructed the progress of the building, were being re-

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moved, and that, after the building had stood still at a place near the town hall, with the rope taut, for about forty-five minutes, the plaintiff, in the darkness of the evening, not seeing the rope, attempted to cross the street on the crosswalk, tripped on the rope and fell. *Held*, that, assuming without deciding that there was evidence from which a finding that the rope was a defect would have been warranted, there was no evidence that the authorities of the town had notice of such defect or might have had notice of it by the exercise of proper care and diligence.

TORT under R. L. c. 51, § 18, for injuries alleged to have been received by the plaintiff, while walking on Mechanic Street in the defendant town, by reason of an alleged defect in the street, as stated in the opinion. Writ in the Superior Court for the county of Worcester dated May 25, 1907.

There was a trial before *Gaskill*, J., who directed a verdict for the defendant, and reported the case to this court. The facts are stated in the opinion.

J. E. McConnell, (*J. H. P. Dyer* with him,) for the plaintiff.

F. Freeman, for the defendant.

KNOWLTON, C. J. The plaintiff, in the evening of September 21, 1905, struck her foot against a rope stretched along a street in the defendant town and was thrown down and injured. The rope was attached to a building which was being moved through the street with the permission of the selectmen, granted in accordance with R. L. c. 52, § 13. While the building was being moved the rope, which was attached at one end to a capstan, was itself in motion, under the care of the workmen. As the work went on, there was interference by the building with the system of wires for electrical lighting, and the building was stopped until the wires could be cut by the employees of the lighting company, and the rope was left taut in a line about eighteen inches above the surface of the street. This action was brought on the ground that the defendant was liable for a defect in the street.

At the close of the plaintiff's evidence the judge ruled as follows: "Your evidence shows that the rope was stationary and not in use at 8:30 P. M. Your plaintiff says that she left the church between 8:30 and a quarter to nine, and took her perhaps five minutes to walk there. No evidence has been introduced to show that any of the town officials had notice, and therefore the question arises whether fifteen or twenty minutes at the out-

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side was sufficient time within which the town ought reasonably to have had notice of the condition of things there. I am of opinion that the plaintiff is not entitled to recover." A verdict having been rendered for the defendant, the question whether this ruling was correct is reported to this court.

We assume in favor of the plaintiff that the rope, in its position at the time of the accident, constituted a defect within the meaning of the statute. It was not then in use and it ought not to have been left stretched a foot and a half above the ground in the darkness of the evening. On the other hand, the use of the street for the removal of the building, with written permission from the selectmen, was lawful. It is to be inferred on this record that the permission was properly granted in accordance with the provisions of the statute. We must assume that, in giving the permission, terms had been imposed such as the public safety required. The existence of the building in the street would necessarily cause some obstruction to travel, and the capstan and ropes, such as are ordinarily and rightly used in moving a building, would interfere with ordinary travel at the places where they were set up, while they were in use in drawing forward the building. In a less degree, every vehicle or team moving on a street interferes for the time with the use of that part of the street which it occupies. It is the duty of every person in charge of such a vehicle or team, as well as of every person moving a building in a street, to take proper measures for the protection of other travellers, so far as his occupation of the street might expose them to danger. Taking precautions of this kind is a part of the terms that properly may be prescribed by selectmen under the statute above referred to.

There is nothing in this case to show that there was any failure to take proper precautions while the work was going on, or that the rope by which the building was drawn, while it was in motion in charge of the workmen, was a defect in the way.

The only question is whether, after the work stopped and the rope was left there unnecessarily, such a length of time elapsed that the authorities of the town, in the exercise of reasonable care, should have had notice of its position and should have removed it. The judge in his ruling referred to this time as "fifteen or twenty minutes at the outside." This was in accord-

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ance with the greater part of the evidence, but a part of the testimony of the witness Cummings would have warranted a finding that it was nearly, if not quite, three quarters of an hour from the time when the moving was interrupted to the time of the accident. This was between eight o'clock and a quarter before nine o'clock in the evening. While the place was not very far from the town hall where the selectmen had their office, it is not to be presumed that their office was occupied at that hour of the evening. Nor is it to be supposed that in a town other officers or agents of the town, charged with a duty as to the care of highways, would be likely to get notice in less than three quarters of an hour that the rope had been left in such a position as to endanger travellers on the street. Such a condition was not a kind of defect that would be likely quickly to attract public attention in the evening, and to be brought to the knowledge of the authorities, as calling for immediate official action. The rope presumably was in charge of the workmen engaged in moving the building, and they would be expected without much delay to take such action in regard to it as would protect travellers on the street. It is only when the defect might have been remedied or the injury prevented by reasonable care and diligence on the part of the town, or when the town had reasonable notice of the defect, or might have had notice by the exercise of proper care and diligence, that a liability exists in a case of this kind. R. L. c. 51, § 18. The condition while the building was in motion and the rope was being lawfully and properly used to move it was not unlawful, although it might have interfered more or less with travel by others.

In *Stoddard* v. *Winchester*, 154 Mass. 149, there was a condition of the street that was likely to cause a defect in a time of storm, and the defect had been in existence about an hour before the accident. It was not contended that there was evidence of notice to the town of the existence of the defect, and it was held that there was no liability. See also *Whitney* v. *Lowell*, 151 Mass. 212, and *Stanton* v. *Salem*, 145 Mass. 476. In *Donaldson* v. *Boston*, 16 Gray, 508, 511, the rule in this class of cases is stated as follows: "The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the exist-

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ence of the defect, or with proper vigilance and care might have known it." We are of opinion that the plaintiff failed to introduce evidence of such facts.

Judgment on the verdict.

JAMES FITZGERALD *vs.* WORCESTER AND SOUTHBRIDGE STREET RAILWAY COMPANY.

Worcester. September 29, 1908. — October 23, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Street Railway.*

Negligence on the part of the car despatcher of a street railway company in the performance of his duties is negligence of an employee of such company who is intrusted with and exercising superintendence under R. L. c. 106, § 71, cl. 2, and such company is liable to its other employees for personal injuries caused by such negligence.

At the trial of an action against a street railway company under R. L. c. 106, § 71, cl. 2, § 72, by the administrator of one alleged to have received injuries which resulted in his death in a collision between two electric street cars of the defendant, one of which the plaintiff's intestate was operating as motorman, there was evidence that the car which the plaintiff's intestate was operating was being run under and in accordance with special orders and not as one of the cars upon the defendant's regular schedule, and that the car which ran into it was running on the regular schedule; that it was a general custom of the defendant to notify both the conductor and the motorman of a regular car which was to wait for a special car, and also to post all orders for special cars which conflicted with the regular schedule on a certain bulletin board in the car barn; that, at a reception given to a retiring officer of the defendant the night before the accident, the plaintiff's intestate and the conductor in charge of his car received their orders as to the special car orally from the car despatcher of the defendant, and at the same time the conductor of the regular car which ran into theirs received oral notice not to start from the car barn until the car, which the plaintiff's intestate was running, had passed, but that the motorman of the regular car received no notice or order with regard to the special car, and that no notice was posted on the bulletin board. *Held*, that there was evidence warranting findings that the car despatcher was negligent in not giving to the motorman of the regular car, as well as to the conductor, orders to wait for the special car, and in not posting the order as to the special car on the bulletin board, and that such negligence was the cause of the collision.

TORT for damages for the conscious suffering and death of the plaintiff's intestate, resulting from a collision beween two

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electric street cars of the defendant, one of which he was operating as motorman, and alleged to have resulted from "negligence of employees of the defendant who were intrusted with and were exercising superintendence, and whose sole or principal duty was that of superintendence." Writ in the Superior Court for the county of Worcester dated October 5, 1907.

There was a trial before *Gaskill*, J. The material facts are stated in the opinion. In his charge he submitted four questions to the jury, which were answered as follows:

1. Was the injury to the deceased George H. Fitzgerald caused by the negligence of William Kingdon? Yes.

2. Was the injury to said deceased caused by the negligence of Adams? Yes.

3. How much is the plaintiff entitled to for the conscious suffering of said deceased? $2,500.

4. How much is the plaintiff entitled to for the death of said deceased? $2,500.

The presiding judge then directed the jury to return a verdict for the defendant, and reported the case to this court with the stipulation that, if he was correct in directing the verdict, the verdict was to stand, but if he was not correct, "judgment was to be entered for the plaintiff, by agreement of counsel, for $5,000 with interest and costs."

C. M. Thayer, (*J. O. Sibley* with him,) for the plaintiff.

C. C. Milton, for the defendant.

LORING, J. This action was brought to recover damages for the conscious suffering and death of George H. Fitzgerald, who, in August, 1907, was a motorman in the defendant's employ.

By the defendant's regular schedule it was Fitzgerald's duty to run a car each week day, with one Campbell as conductor, from Charlton to Worcester, starting from the car barn in Charlton at 5.45 A. M. On the evening of August 28, Fitzgerald and Campbell received a verbal order from one Kingdon, the defendant's car despatcher, to run their car as a special car from Charlton to Southbridge and return before starting their regular trip from Charlton to Worcester at 5.45 A. M. The order was to start from the Charlton car barn at 5.05 A. M., go to Southbridge, leave Southbridge on the return trip at 5.27 A. M., passing two cars at the optical works in South-

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bridge, "then right of way to the car barn and then on regular schedule," to quote from the testimony of Campbell.

Fitzgerald and Campbell left Charlton on the morning of August 29 as instructed, arrived at Southbridge, and started on the return trip. There was evidence that when they were within a minute and a half or two minutes of Charlton they were run into by a car which by the regular schedule left Charlton for Southbridge at 5.45 A. M., the same minute at which, by the same schedule, Fitzgerald's and Campbell's car was to leave Charlton for Worcester; that Fitzgerald first saw this car when it was about two hundred feet away, as he came around a curve at full speed (from twenty to twenty-five miles an hour); that he did all in his power to stop his car; but that in spite of this the other car (an open one) "mounted" his car (a closed one) and he was caught before he could get out of the way.

Whether Fitzgerald and Campbell were behind time on the one hand, or on the other hand whether the other car started before the schedule time was not clear on the evidence and is not important. There was evidence that the car despatcher told the conductor of this other car "to wait at the car barn until he had seen us [Fitzgerald and Campbell] go by," to quote again from Campbell's testimony.

One Farquhar was the motorman of this other car which, by the regular schedule, was to leave Charlton for Southbridge at 5.45 A. M.

It appeared that the car despatcher's office was at the defendant's car barn at Oxford.

It happened that Kingdon, the car despatcher, Fitzgerald and Campbell (the motorman and conductor of the car which ran as a special car to Southbridge with the right of way on its return trip to Charlton) and Smith (the conductor of the regular car leaving Charlton for Southbridge and running against the special car if it left Charlton before that car arrived there) were at a reception at Webster on the evening of August 28, and that all the orders given by Kingdon the car despatcher were given there, by word of mouth. Farquhar (the motorman of this other car) was not at the reception and received no order or notice in the matter. This reception was given to one

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Anderson, the superintendent of the defendant's railway, who was leaving its employ, and was attended by some eighteen to twenty employees.

The plaintiff introduced evidence from which the jury were warranted in finding that it was the general custom of the defendant corporation to notify both the conductor and the motorman of a regular car which is to wait for a special car, and also to post all orders for special cars which conflict with the regular schedule on a bulletin board hung under the clock in the motormen's and conductors' lobby in the Charlton Street car barn.

Where the result of an employee's forgetting an order is not of serious consequence, an employer's duty is performed if the proper order is given clearly by word of mouth to one employee. But where life or death hangs on an order's being executed as given, no chances should be taken. It might well be found in such a case to be an act of negligence if precautions were not taken against the order's being forgotten or misunderstood.

The general custom of the defendant's road (which was testified to in the case at bar) required such precautions to be taken in giving an order of that kind. That general custom testified to was to notify the motorman as well as the conductor of the regular car which was to wait for the special car, and to post such an order on the bulletin board in the motormen's and conductors' lobby in the car barn from which the regular car was to start.

In the case at bar the plaintiff waived all but two counts of the declaration. In both of these the plaintiff counted on "the negligence of employees of the defendant who were intrusted with and were exercising superintendence and whose sole or principal duty was that of superintendence." His contention is that the negligence of a car despatcher is the negligence of an employee of the defendant who was intrusted with and was exercising superintendence.

The plaintiff is right in this contention. It was decided in *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168, that a car despatcher to whom is confided the management of cars on the tracks of a street railway is an employee intrusted with and exercising superintendence, and whose sole or principal duty

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is that of superintendence within R. L. c. 106, § 71, cl. 2. See also in this connection *Hankins* v. *New York, Lake Erie & Western Railroad*, 142 N. Y. 416; *Lewis* v. *Seifert*, 116 Penn. St. 628; *Darrigan* v. *New York & New England Railroad*, 52 Conn. 285.

From what has been said the jury were warranted in finding that Kingdon was negligent in not giving the order to Farquhar, the motorman of the regular car, as well as to Smith, the conductor of it, to wait in the car barn until the special car had passed; and in not posting that order on the bulletin board.

The defendant has made the further contention that the cause of the accident here in question, and the sole cause of it, was Smith's having forgotten the order which the evidence showed was given to him by Kingdon by word of mouth; and for that reason that the case comes within *Stone* v. *Boston & Albany Railroad*, 171 Mass. 536, *Glassey* v. *Worcester Consolidated Street Railway*, 185 Mass. 315, and *Higgins* v. *Higgins*, 188 Mass. 113.

But the reasons which make it the duty of the employer or his superintendent (in such a case as that now before us) to take precautions against an order being forgotten or misunderstood make the failure to do that a proximate cause of the accident if an order verbally given to the conductor alone is forgotten and an accident occurs.

In this event, by the terms of the report, judgment is to be entered for the plaintiff for $5,000, with interest and costs. But since the $2,500 for which a verdict is given in the first count goes to different persons from those to whom the $2,500 for which a verdict is given in the second count should be paid, we construe the report to mean that the verdict entered for the defendant should be set aside, that a judgment for $2,500 is to be entered on each count, as of the date of the trial. That judgment should carry interest from the date of the verdict with one set of costs.

So ordered.

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L. D. WILLCUTT AND SONS COMPANY *vs.* JEREMIAH J. DRISCOLL & others.

Suffolk. March 19, 1907. — October 24, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To enjoin unlawful interference with business. *Unlawful Interference. Conspiracy. Labor Union*, Coercion by threats of fines.

A building contractor can maintain a suit in equity to enjoin the members of a labor union, who are engaged in a lawful strike for higher wages and shorter hours of work, from causing those of his day laborers who are members of the union to leave his employ by threatening to impose fines upon them under a by-law of the union. Following *Martell* v. *White*, 185 Mass. 255. SHELDON, J. & KNOWLTON, C. J., dissenting, on the ground that the fining of the members of a union, under a by-law previously adopted, for refusing to join in a justifiable strike is lawful and properly may be resorted to in trying to maintain the strike. Distinguishing the point actually decided in *Martell* v. *White*. LORING, J., concurring in the decision of the majority of the court, on the ground that the present case cannot be distinguished from *Martell* v. *White* and that, although the doctrine of that case is not to be extended, the purposes of justice do not require that that case should be overruled as to the point that the use of threats of fines to exert coercion is illegal.

BILL IN EQUITY, filed in the Superior Court on July 19, 1906, and amended on November 22, 1906, by a corporation, engaged in the business of constructing buildings, against (as amended) certain individuals as officers and members of two voluntary unincorporated associations, the Bricklayers' Benevolent and Protective Union Number Three, and the Stonemasons' Benevolent and Protective Union Number Nine, both of Boston and the vicinity, and all other members of those unions, being upwards of eighteen hundred in number and most of them to the plaintiff unknown, the individuals named being the officers chosen by those unions for the management of their affairs and for doing the acts for and in behalf of the unions which were complained of in the bill, to enjoin the defendants from combining and conspiring by threats or intimidation to prevent any person or persons from entering the employ of the plaintiff or remaining therein, and particularly by the imposition of fines and penalties upon members of those unions

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who desired to work for the plaintiff, from inducing or persuading in any way persons then, or thereafter, in the employ of the plaintiff from leaving such employment and breaking their contracts of employment, from imposing any fines or penalties or exercising any compulsion of any kind or using any threats or intimidation to prevent any person or persons, whether members of those unions or not, from entering into and continuing in the employ of the plaintiff, and for further relief.

In the Superior Court the case was heard by *Gaskill*, J., who made a memorandum of findings of fact, which so far as they are necessary to an understanding of the case appear in the opinion of the majority of the court. The judge concluded his findings of fact with the following statement:

"The question resolves itself into this: In case of a justifiable strike, has the contractor the right to invoke the aid of the court to prevent the labor union from imposing a fine or taking action to impose one upon one or more of its members under its rules to induce them to leave the contractor's employ to his injury. I think not.

"I am of opinion that Reagan was not justified in threatening the imposition of a fine. Decree for plaintiff against Reagan, bill dismissed as to other defendants." Reagan threatened a journeyman mason who previously had been a member of one of the unions with a fine of $100 if he continued to work. The judge made a final decree enjoining the defendant Reagan, and dismissing the bill as to the other defendants. The plaintiff appealed.

The case was argued at the bar in March, 1907, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

E. A. Whitman, for the plaintiff.

F. W. Mansfield, for the defendants.

Hammond, J. This bill, although originally brought against two unincorporated associations or labor unions by name, has now been amended, so that it runs only against certain individuals as officers and members of these associations and against the other members of those associations as represented by these individuals. No question is made that the defendants do not sufficiently represent all the members of both unions; and the

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bill is not open to objection upon this ground. *Pickett* v. *Walsh*, 192 Mass. 572, 589, 590, and cases there cited.

The questions before us are raised upon a report of the facts found by the judge of the Superior Court who heard the case. They grew out of a trade dispute between the plaintiff and the members of the unions who were in its employ. In April, 1906, these unions adopted a code of working rules, in which, beside some minor demands not now material, they demanded that wages be increased five cents an hour, that all foremen should be members of the unions, that the business agent of the unions should be allowed to visit any building under construction to attend to his official duties, and that wages should be paid during working hours. The plaintiff declined to accept these rules, and a strike followed.

By the constitution and rules of the unions it appeared that a code of fines and penalties was established by the International Union, an association composed of these and other similar unions throughout the country, and that this code was being actively enforced by the local unions. One rule provided that any member violating any section of the working code should be fined upon conviction not less than five nor more than twenty-five dollars, one of these sections being that "No member of the Union shall work with a non-union man who refuses to join the Union." Various other penalties were provided, varying from five to five hundred dollars for each offense, to be imposed upon persons designated as "common scabs," "inveterate or notorious scabs," and "Union wreckers," these terms being applied to those who in different ways persist in working after a strike has been called. These fines in their operation are likely to be coercive in their nature.

This code was actively enforced by the unions, and most of the members of the unions who left their work did so through fear of the fines that would be imposed upon them if they continued to work. The defendants Driscoll and Reagan on one occasion found two men at work for the plaintiff, one a journeyman who had been and the other a foreman who then was a member of the union. Reagan threatened the journeyman with a fine of $100 if he continued to work, and Driscoll notified the foreman that he was called out. Both refused to leave. Driscoll reported

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the fact at a meeting of the union and a vote was passed that charges be preferred against the men for working contrary to the rules. A preliminary injunction was issued in this case, and no further steps were taken under the vote.

The defendants established strike headquarters, and provided a strike fund from which payments were made to the strikers and other men out of work. Some of the defendants made constant visits to a job of the plaintiff, generally at noon time, to persuade men, whom the plaintiff had hired, to leave its employ. They offered as inducements in some cases to non-union men membership without the full payments usually required, and in other cases work elsewhere. Men frequently left the plaintiff's employ after these talks, in some cases stating that they would like to work but could not run the risk of being fined. The defendant Driscoll induced two men to go who otherwise would have continued at work, by paying them with funds of the unions the wages due them from the plaintiff and providing them with transportation to Utica, New York, where he had secured other work for them.

The plaintiff was constructing other buildings at Fairhaven and at Andover, which were within the districts of other unions; and the union men employed by the plaintiff on those jobs also struck. It was found however that these men were not under the control of the defendants, though it did fairly appear that these strikes were a direct result of the strike in Boston, since all these unions were affiliated together in the International Union and all members of the unions were familiar with what should be done in such cases.

It was admitted that the defendants were not persons of financial responsibility, and the judge found "that the acts of the defendants as above set forth were calculated to interfere and did interfere with the performance of the plaintiff's contracts for the construction of buildings, and had they continued, would have seriously embarrassed the plaintiff in the prosecution of its business, and that such consequences were contemplated by the defendants in their endeavor to force the plaintiff to accept their working rules to govern the management of its business."

As already stated, the strike had four objects. Of these the demand for an increase of wages was properly enforceable by a

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strike. The demand that wages should be paid during working hours amounts merely to a demand for a shorter day, and also was properly enforceable by a strike. The reasonableness of such demands we have not the means of determining; and it is settled that such matters are best left to be adjudicated in the freedom of private contract between the interested parties. More difficult questions are presented by the demands that all foremen shall be members of the unions, and that the business agent of the unions shall be allowed to visit any building under construction. See as to the first of these points a very interesting article by Professor Smith, 20 Harvard Law Review, 431, note 1. But it is unnecessary under the circumstances to determine these questions, as the plaintiff replied with a bare refusal of all the demands.

We are of opinion therefore that this strike must be regarded as simply a strike for higher wages and a shorter day. It was not a mere sympathetic strike, as in *Pickett* v. *Walsh*, 192 Mass. 572, 587, or one whose immediate object was only remotely connected with the ultimate object of the strikers, as in *Plant* v. *Woods*, 176 Mass. 492. It was a direct strike by the defendants against the other party to the dispute, instituted for the protection and furtherance of the interests of the defendants in matters in which both parties were directly interested and as to which each party had the right, within all lawful limits, to determine its own course. Such a strike must be treated as a justifiable strike so far as respects its ultimate object.

But however justifiable or even laudable may be the ultimate objects of a strike, unlawful means must not be employed in carrying it on; and it is contended by the plaintiff that the use of fines and threats of fines, under the circumstances disclosed in the record, are unlawful. The question is stated by the trial judge in the following language: "In case of a justifiable strike, has the contractor the right to invoke the aid of the court to prevent the labor union from imposing a fine [which the court has found to be coercive in its nature] or taking action to impose one upon one or more of its members under its rules to induce them to leave the contractor's employ to his injury?" Under the findings of the judge it would seem that the question is not intended to be quite so broad as otherwise might be inferred

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from its language. The language is broad enough to include the case where the employee is under a contract to stay with his employer and where to leave would be a violation of that contract. But no such state of things appears upon the record. The plaintiff "hired its masons by the day and paid them on the basis of the number of hours worked, and it might have discharged them and they might have left at the close of any day." The question must therefore be considered as applying only to cases where the employee by leaving violates no contractual right of the employer.

The question how far the imposition of fines by an organization upon its members where the effect is to injure a third party is justifiable, was considered by this court in *Martell* v. *White*, 185 Mass. 255; and it was there adjudged that the imposition of such a fine by which members of the organization were coerced into refusing to trade with the plaintiff, not a member, to his great damage, was inconsistent with the ground upon which the right to competition in trade is based, and as against him was not justifiable. In the course of the opinion the case of *Boutwell* v. *Marr*, 71 Vt. 1, was cited, in which the same conclusion was reached. In *Martell* v. *White* five justices sat, and four of them, being a majority of the whole court, concurred in the ground upon which it was decided. The case was carefully presented by counsel, the questions involved were regarded as important, and there was a difference of opinion among the judges who sat in it. It was therefore considered at great length; and the conclusion was reached after a most exhaustive discussion and the most careful deliberation. It stands as a solemn adjudication by this court after such discussion and deliberation. So far as respects the trend of judicial opinion and authority there has been no change since the decision was announced unfavorable to it or to the ground upon which it was reached. On the contrary, so far as we are aware, whenever the case has been mentioned by members of the profession, whether they be judges engaged in the practical administration of the law, or professors teaching the students of our schools the true theory of legal principles, it has been received with favorable comment. See *Brennan* v. *Hatters of North America*, 44 Vroom, 729; *Allis-Chalmers Co.* v. *Iron Moulders' Union No. 125*, 150 Fed. Rep. 155, 178;

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20 Harvard Law Review, 355, 356; 17 Green Bag, 210. There is every reason why the doctrine of *stare decisis* should apply; and, so far at least as respects this Commonwealth, the case must be held as settling the correctness of the principle upon which the decision was based.

That principle, if applicable to the facts of this case, is decisive. The majority of the court are of the opinion that it is applicable, and hence that there should be a decree for the plaintiff enjoining intimidation or coercion by fines.

Under ordinary circumstances this opinion would end here. But inasmuch as a minority of the court still think that the principle laid down in *Martell* v. *White*, with reference to intimidation by fines imposed by an organization upon its members, is not correct, and also, perhaps, that, even if correct, it is not applicable to the facts of this case, and are unwilling to accept that principle as law in this Commonwealth notwithstanding the authority of that case, it may be well to say something in addition to what was there said. We are also somewhat influenced to take this action by reason of the importance of the question and its relation to a part of the law still in the nebulous but clearing stage.

Before entering more fully upon the discussion it is well to get a clear conception of what the case is. To begin with, it is not a contest between the members of two competing labor unions, as was *Plant* v. *Woods*, 176 Mass. 492, nor is it a conflict between an organization and one of its members in a matter in which no third party is interested. Neither does the plaintiff corporation contend that it has any right to compel the intimidated workman to enter its employ. Nor is it seeking, in behalf of a member of a union, to enforce or defend the right of such member to be free from a fine or threat of a fine. The plaintiff has no concern with the imposition of fines by a union upon its members unless, and only so far as, such an imposition is in violation of a right of the plaintiff. Even if the fine be illegal the plaintiff has no standing in court to complain unless some one of its rights is invaded to its damage. In a word, the case is not between the party imposing the fine and the person fined, nor between the person fined as such and a third party who suffers, but on the contrary it is between such third party and

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the party imposing the fine. If it were only between the person fined and the party imposing the fine, then with some degree of plausibility it might be said that the former had no right to complain, or at least had waived that right; but it is manifest that neither of the immediate parties to the fine can, either by an agreement among themselves or by waiver, justify the invasion of the right of a third party, if any he has, to object to it.

What is the complaint of the plaintiff? It is a corporation engaged in the construction of buildings and employing a number of men. Its men left its employ on a strike. To keep them away the defendants threatened with fines such as were members of the unions, and by that means kept them away from the plaintiff when otherwise they would have stayed; — all to the great damage of the plaintiff. Shortly stated the case is this: The plaintiff's men are being coerced by threats of a fine to leave its employ, greatly to its injury, the fines to be levied in accordance with the by-laws of a voluntary association of which the proposed victims are members. This injury to the plaintiff is intended by the defendants. Has the plaintiff any standing in equity to an injunction against the infliction of such injury?

It is to be premised that the right which the plaintiff seeks to have protected against the acts of the defendants arises from no contract or statute, but out of the nature of things. It is one of the large body of rights which have their foundation in the fitting necessities of civilized society. It is the common law right to a reasonably free labor market. Vice Chancellor Stevenson, in speaking of it, says it has been called a "probable expectancy," and describes it as "the right which every man has to earn his living or pursue his trade without undue interference." *Jersey City Printing Co.* v. *Cassidy*, 18 Dick. 759, 765. He further remarks (pp. 765, 766): "It will probably be found . . . that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market." And in *Atkins* v.

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Fletcher Co. 20 Dick. 658, 664, the same judge says: "The elemental right of the employer of labor which the courts recognize to-day no doubt is the right to employ, while the corresponding right of the workman is the right to be employed. In other words, the right to buy labor and the right to sell labor are recognized by the law, and their enjoyment is greatly impaired or destroyed unless freedom in the labor market — freedom on both sides of the labor market — is maintained. Each party to a contract for the sale of labor has an interest in the freedom of the other party with respect to making the contract." In the words of Lord Lindley in *Quinn* v. *Leathem*, [1901] A. C. 495, 534, "A person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so." This right of the employer is conclusively established by the numerous cases which hold that he may maintain an action against those who by intimidation prevent persons from entering into his employ. See remarks of Lord Halsbury in *Allen* v. *Flood*, [1898] A. C. 1, 71, 72. In our own reports such a case may be found in *Vegelahn* v. *Guntner*, 167 Mass. 92. This is the right — the right to a free labor market — which the plaintiff asserts has been invaded by the defendants, and for which he seeks protection.

The defendants also have rights. They have the right to work or not to work, to sell their labor upon such terms as they see fit and to combine for the purpose of getting more pay or a shorter day. And for the purpose of strengthening their organization and making it more effective they have the right to make appropriate by-laws for its internal management, and for the regulation of the conduct of its members toward each other in matters affecting the general interests of the body; and they may enforce obedience to such by-laws and regulations by fines or other suitable penalties.

But not much progress is made by this general statement of the rights of the respective parties. We are still only on the skirmish line. In the jurisprudence of any civilized country there are but few, if any, absolute rights, — rights which bend to nothing and to which everything else must bend. The right to one's life would seem to be quite absolute, but it must yield to the private right of self-defense and to the public right to punish

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for crime. And so in the case before us, neither the right of the plaintiff to a free labor market nor the right of the union to impose a fine upon its members is absolute. Neither is to be considered apart from the other, or without reference to any other conflicting right, whether public or private; but each must be regarded as having in the rules of human conduct its own place beyond the limits of which it must not go. Moreover it must be borne in mind (what sometimes seems to be forgotten by the actors upon each side of such controversies) that the controversy is not a warfare in the sense that for the time being the usual rules of conduct are changed, as in the case of an actual war between two countries. There is no martial law in these cases, no change in the ordinary rules of society, but these rules remain the same as before, commanding what was theretofore right and prohibiting what was theretofore wrong.

The right of an employer to free labor is subject to the right of the laborer to hamper him by many expedients short of fraud or intimidation amounting to injury to the person or property of those who desire to enter his employ, or threats of such injury. For instance, persuasion not amounting to such intimidation is lawful, and perhaps the same may be said of social pressure even when carried to the extent of social ostracism, not including however any threat in a business point of view. See *Vegelahn* v. *Guntner*, 167 Mass. 92; *Jersey City Printing Co.* v. *Cassidy*, 18 Dick. 759, 769; 20 Harvard Law Review, 267. Social rights and privileges must take care of themselves. The law cannot prescribe with whom one shall shake hands or associate as a friend.

So long also as the by-laws of a union relate to matters in which no one is interested except the association and its members, and violate no right of a third party or no rule of public policy, they are valid. Fines may be imposed, for instance for tardiness, absence, failure to pay dues, or for misconduct affecting the organization or any of its members; and for numerous other acts. It cannot be successfully contended, however, that as against the right of some party other than the association and its members an act, otherwise a violation of the third party's rights, is any less a violation because done by some member in obedience to a by-law. If a member commits an assault upon a

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person, and is called into court by the Commonwealth upon a criminal complaint, or in a civil action by the victim, he can find no valid ground of defense in the fact that he committed the assault in compliance with the requirements of a contract with some other person, or in obedience to a by-law of an association of which he was a member. So a by-law providing that, upon an order to strike, every employee shall quit work even although such an act should be in violation of a contract then existing between him and his employer for continuous service, and that for failure thus to break his contract the member should be fined, doubtless would be declared invalid. And the principle at the bottom of such a decision is this, namely: An interference with the right of a third party cannot be justified upon the ground that the intruder is acting in accordance with an agreement between him and some other person. In a word, so long as a fine is imposed for the guidance of members in matters in which outside parties have no interest, or in which there is no violation of a right of an outside party, then no such party can complain. But when the right of such a party is invaded, it is no defense, either to the person fined or to those who have imposed the fine, that the invasive act was done in accordance with the by-laws of an association.

In the case before us, standing opposed to each other, are these two rights: the right of the employer to a free labor market, and the right of the striking employees in their strife with him to impair that freedom; and the crucial question is, how far can the latter go? On which side of the line shall stand the matter of coercion by fines imposed by a union upon its members to impair that freedom? Is the employer's right to a free market subject to this system of mutual intimidation and coercion by fines, or is the right to establish such a system subject to the right of the employer to a free market? If the employer's right is not subject to this method of intimidation, then of course as against him it is unlawful. If it is subject to it, then he cannot complain, no matter how severe the blow.

So far as concerns the law in this Commonwealth at least, some things seem to be settled. It is settled that the flow of labor to the employer cannot be obstructed by intimidation or coercion produced by means of injury to person or property, or

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by threats of such injury. *Vegelahn* v. *Guntner*, 167 Mass. 92. In that case Allen, J., said: "Such an act [picketing as a means of intimidation] is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. *Commonwealth* v. *Perry*, 155 Mass. 117. *People* v. *Gillson*, 109 N. Y. 389. *Braceville Coal Co.* v. *People*, 147 Ill. 66, 71. *Ritchie* v. *People*, 155 Ill. 98. *Low* v. *Rees Printing Co.* 41 Neb. 127." See also *Sherry* v. *Perkins*, 147 Mass. 212. And it is unnecessary to cite cases in support of the proposition that such is the great weight of authority elsewhere, even though the ultimate object of the strike be legal.

There can be no doubt that fining is one method of injuring a man in his estate, and that a threat to fine is a threat of such an injury. Indeed this is recognized by the decree made by the trial court in this very case, so far as it affects Reagan, one of the defendants, who it was found had threatened with a fine a man once but not then a member of a union.

It is urged however that although this method of intimidation is generally an invasion of the employer's right to a free market and therefore illegal, yet when the intimidation is exerted by a union upon its members in accordance with its by-laws in a strike whose object is legal, it is justifiable and legal. To this the obvious reply is that the rule of freedom to contract is founded upon principles of public policy, that each party to a contract is interested in the freedom of the other party, that it can make no difference to the public or to the employer (who in the present case is the other party), that the person intimidated is or is not a member of the society intimidating. In either case the injury is the same and is from the same cause, namely, intimidation. The workman is no longer free. In *Longshore Printing Co.* v. *Howell*, 26 Ore. 527, the court, after speaking of the general right of labor unions to make rules, proceeds thus: "It must be understood, however, that these associations, like other voluntary societies, must depend for their membership upon the

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free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind to increase or keep up or maintain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules and regulations through violence, threats or intimidation, or to employ any methods that would induce intimidation or deprive persons of perfect freedom of action."

The keynote on this matter is struck in *Booth* v. *Burgess*, 65 Atl. Rep. 226, 233, in the following language: "No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employees who are first coerced, made by them when they enter their labor unions, can . . . affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employees are permitted to exercise their liberty. The employees may be able to surrender their own right, but they certainly cannot surrender the rights of other parties," citing *Boutwell* v. *Marr*, 71 Vt. 1, and *Berry* v. *Donovan*, 188 Mass. 353. And in *Downes* v. *Bennett*, 63 Kans. 653, 662, there is a recognition of the same doctrine: "This is not the case of a union or association of persons intimidating its members from engaging in a specific service offered by an employer, and standing ready and open to be entered. In such cases, on a showing of continuous damage caused by inability to secure employees, preventive relief has been afforded." *Boutwell* v. *Marr*, 71 Vt. 1.

An opposite doctrine leads to strange conclusions. For instance, if ten men banded together undertake by coercion to keep two other men from entering an employment, and they do this in order to force the employer, for lack of ability to get the two, to employ them (the ten), the employer's right to a free market is invaded, and if he suffers thereby he may proceed either in equity or law against the ten; but if the ten men first induce the two other men to enroll themselves in the same organization with the ten, then, it is said, the ten men may by fines or threats of fines so intimidate the two men as to frighten them from the employer; and that such intimidation is no violation of the employer's right. A rule of law which leads to such inconsistencies is not to be adopted. It does not distinguish between coercion and non-coercion, but between organized

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coercion and sporadic coercion. It makes a distinction entirely foreign and immaterial to the ground upon which the right to a free market is based.

If it be said that fines are not in themselves illegal, and that consequently their use cannot be illegal, the answer is that when they are used as a method of coercion and create a kind of coercion inconsistent with the right of a person they are, as against that person's right, illegal. If it be said, as we have heard it said, that fines are innocent and cannot be illegal because they are used by all governments as a method of punishing criminals, the answer is that if the principle is true that, what a government may do to punish for crime, individuals or societies may do to enforce private rights, then it follows that a by-law providing for imprisonment or even death may be legal.

If it be said that the member fined may take his choice either to leave the organization or abide by its rules to which he has before assented, and that where there is a choice there can be no coercion, the answer is that in almost every conceivable case of coercion short of an actual overpowering of the physical forces of the victim there is a choice. The highwayman, who presents his cocked pistol to the traveller and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. In *Carew* v. *Rutherford*, 106 Mass. 1, the victim had a choice either to pay a fine or take the consequences of a refusal. And so the member of a labor union has the choice either to pay the fine or leave the union. Is it difficult to realize what that choice is in these days of organized labor? Is it too much to say that many times it is very difficult, indeed practically impossible, for a workman to get bread for himself and his family by working at his trade unless he is a member of a union. It is true he has a choice between paying his fine and not paying it, but is it not frequently a hard one? May not the coercion upon him sometimes be most severe and effective? Such is not a free choice. And a market filled with such men is not a reasonably free market. In this connection the language of *Boutwell* v. *Marr*, 71 Vt. 1, seems significant and appropriate: "The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor

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as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible. . . . The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the member of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation simply by working through an association."

If it be said that without fines the same result may be indirectly reached by the organization by exercising two rights, namely, the right to expel a member and the right to charge an initiation fee upon his return, and since the same result may thus be legitimately reached, nobody is harmed if it be reached by fine, the reply is that if the purpose of expulsion and the subsequent initiation fee be each a part of one and the same transaction, namely, the imposition of a fine, and the two acts are in substance the procedure by which the intimidation by fine is exercised, and such is the intention, then there may be a strong reason for holding that such a procedure is one imposing a fine and should be treated as such. Ordinarily, however, each separate act should be treated by itself and its validity judged by itself. The fact that separately and independently executed they incidentally may have the effect of a fine is immaterial on the question of the right to fine. The fact that a result may be incidentally reached in one way does not show that the same result may be lawfully reached in another way.

In considering this question we cannot lose sight of the great power of organization. It should be taken into account when one is considering where the line should be drawn between the right of the employer to a free market and the right of workmen to interfere with that market by coercion through the rules of a labor union. It is not universally true that what one man may do any number of men by concerted action may do. In *Pickett* v. *Walsh*, 192 Mass. 572, Loring, J., after alluding to the great increase of power by combination, says: "The result of this greater power of coercion on the part of a combination of

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individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do."

This organization of labor to better the condition of the laborer is natural and proper. There can be no doubt that it is the most effective way, perhaps the only effective way, in which as against the organization of capital the rights of the laborer can be adequately protected. In many ways the labor unions have succeeded in bettering the condition of the laborer; and so far as their ultimate intentions and the means used in accomplishing them are legal they are entitled to protection to the extreme limit of the law.

But their powers must not be so far extended as to encroach upon the rights of others. It is clear that if the power to intimidate by fine be regarded as one of the powers which labor unions may rightfully exercise, then the right to a free market for labor, — nay, even the right of the laborer to be free, — is seriously interfered with, to the injury both of the public and the employer as well as the laborer.

In *Martell* v. *White*, 185 Mass. 255, it was said: "The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of those laws." So of competition in labor; and so of competition between the employer and employee. The contest between them is only competition on a wide basis. As was said by Knowlton, C. J., in *Berry* v. *Donovan*, 188 Mass. 353, 358: "In a broad sense, perhaps the contending forces may be called competitors." If the contest be carried on under the rules which regulate the law of supply and demand, leaving those engaged on either side to act under the general and natural laws of business, free from artificial coercion or intimidation as the words are ordinarily understood in this connection, then neither party has the right to complain; but if coercion or intimidation by threats of a direct personal loss, due not to causes arising out of the situation or logical to the situa-

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tion, but to a cause having no natural relation to the situation and entirely inconsistent with the basic principle of freedom of action under the natural laws of business, then there is cause for complaint. Such a method of coercion must be declared illegal, as in violation of the right of the public and all concerned to a reasonably free labor market, that is, a market where all may act under this basic principle of freedom.

In view of these considerations and of others more fully set forth in *Martell* v. *White*, which are not here repeated, and in *Boutwell* v. *Marr*, *ubi supra*, a majority of the court are of opinion that the overwhelming sense of the thing is that the principle that the right of the employer is not subject to coercion or intimidation by injury or threats of injury to the persons or property of laborers standing in the market to meet him, should apply to the coercion and intimidation exerted by labor unions upon their members by fines or threats of fines. Any other conclusion is inconsistent with the existence of a reasonably free labor market to which both the employer and the employee are entitled.

Our attention has not been called to any case, nor are we aware of any, in which the precise point here involved has been discussed, which is inconsistent with the conclusion which we have reached. We are not aware of any case in which it has been adjudged that where a third party has a right to insist that those with whom he deals shall be free from coercion the rule does not apply to coercive acts by way of fines or threats of fines, imposed or to be imposed, by a voluntary association upon its members in accordance with its by-laws. The case of *Bowen* v. *Matheson* was explained in *Plant* v. *Woods*, 176 Mass. 492. Neither in that case nor in *Pickett* v. *Walsh* was there any evidence of coercion by fines. And the same may be said of *Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476; 21 Q. B. D. 544; 23 Q. B. D. 598; [1892] A. C. 25. In that case there was simply a withdrawal of trade advantages under certain conditions. The defendants had two prices, — one price for one class of customers, and a different one for another class. There was nothing in the nature of an arbitrary fine. As stated by Fry, L. J., in the case as reported in 23 Q. B. D. 598, 622, "Competition was in substance the only weapon which the

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defendants intended to use against their rivals in trade. No thought of using violence, molestation, intimidation, fraud, or misrepresentation was entertained by the defendants." See also in same case the language of Coleridge, C. J., 21 Q. B. D. 544, 552; and that of Halsbury, Lord Chancellor, [1892] A. C. on p. 36, as follows: "After a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them"; and that of Lord Watson, on p. 43 of the same volume.

In the preparation of this opinion a large number of cases in addition to those hereinbefore named have been consulted, among which are the following: *Brown* v. *Stoerkel*, 74 Mich. 269; *Flaccus* v. *Smith*, 199 Penn. St. 128; *Fuerst* v. *Musical Mutual Protective Union*, 95 N. Y. Supp. 155; *Burns* v. *Bricklayers' Benevolent & Protective Union*, 14 N. Y. Supp. 361; *Master Stevedores' Association* v. *Walsh*, 2 Daly, C. P. 1; *Froelich* v. *Musicians Mutual Benefit Association*, 93 Mo. App. 383; *Doremus* v. *Hennessy*, 176 Ill. 608; *Bohn Manuf. Co.* v. *Hollis*, 54 Minn. 223; *Temperton* v. *Russell*, [1893] 1 Q. B. 715; *Wabash Railroad* v. *Hannahan*, 121 Fed. Rep. 563; *Mayer* v. *Journeymen Stonecutters' Association*, 2 Dick. 519; *Thomas* v. *Cincinnati, New Orleans & Texas Pacific Railway*, 62 Fed. Rep. 803; *Barr* v. *Essex Trades Council*, 8 Dick. 101. See also for others, those cited in *Martell* v. *White*, 185 Mass. 255, and in *Pickett* v. *Walsh*, 192 Mass. 572.

The result is that in the opinion of a majority of the court there should be a decree restraining and enjoining the defendants, their agents and servants, from intimidating by the imposition of a fine, or by a threat of such fine, any person or persons from entering into the employ of the plaintiff or remaining therein; or from in any way being a party or privy to the imposition of any fine or threat of such imposition upon any person desiring to enter into or remain in the employ of the plaintiff; and it is

So ordered.

SHELDON, J. The Chief Justice and I are unable to assent to the conclusion reached by the majority of the court. We can-

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not convince ourselves that under such circumstances as are here presented the defendants should be enjoined from imposing or threatening to impose fines upon those members of their organization who, by continuing to work for the plaintiff, had, under the rules to which they had themselves assented, become liable to such imposition. The question is one of great practical importance; it has been said that the law upon the subjects involved is not yet fully settled; and we think it proper to state the views which seem to us to be correct.

We assume that any defendants who have instituted or are carrying on an unjustifiable strike, or who for the prosecution and maintenance of a justifiable strike are inducing workmen either to leave or to refrain from entering the employ of a plaintiff, by the use of means which are either unlawful in themselves or would operate as an interference with a superior right of the plaintiff, — who, that is, have combined either to secure an unlawful end or to secure a lawful end by the use of unlawful means, — may be restrained by injunction, at any rate from such specific wrongful acts in furtherance even of a lawful strike as are unjustifiable towards the plaintiff and are likely to cause such injury to the plaintiff as to warrant equity in interfering. It would not be material in such a case that there was no continuing contract of employment between the plaintiff and the servants who were thus induced to leave him, or that the employer was complaining of the action of the labor union in seeking merely to enforce its rules upon its own members, although no question arose between the union itself and workmen who desired to continue in their employment but who were coerced by the fear of fines or of other consequences that might follow their infraction of the rules of the union. See as to this general doctrine *Martell* v. *White*, 185 Mass. 255; *Vegelahn* v. *Guntner*, 167 Mass. 92; *Perkins* v. *Pendleton*, 90 Maine, 166; *Boutwell* v. *Marr*, 71 Vt. 1; *Frank* v. *Herold*, 18 Dick. 443; *Booth* v. *Burgess*, 65 Atl. Rep. 226; *Spaulding* v. *Evenson*, 149 Fed. Rep. 913; *Temperton* v. *Russell*, [1893] 1 Q. B. 715. Nor is it doubted that the promoters of a strike would have no right to persuade a laborer to violate any existing contract of employment with the plaintiff. *Beekman* v. *Marsters*, 195 Mass. 205, 210, and cases cited. *Reynolds* v. *Davis*, 198 Mass. 294. Nor would they have

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a right, by the threat of a fine or of any similar disciplinary measure, to prevent any one who was not a member of their union from working for the plaintiff. *Read* v. *Friendly Society*, [1902] 2 K. B. 88. *Haskins* v. *Royster*, 76 N. C. 601. *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway*, 151 U. S. 1. *Employing Printers' Club* v. *Doctor Blosser Co.* 122 Ga. 509. *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239. This is the fundamental doctrine of *Carew* v. *Rutherford*, 106 Mass. 1.

But the defendants' associations were lawful ones. The language of Knowlton, C. J., in *Reynolds* v. *Davis*, 198 Mass. 294, 302, states as to this point a universally recognized doctrine. No court would assert that the organization of a labor union constituted in itself an unlawful conspiracy. The objects aimed at by these unions were proper ones. Their main object, as stated in the constitution of one of them, the Bricklayers' Benevolent and Protective Union, is, "to unite all practical journeymen bricklayers working within the jurisdiction of this union, so that by concerted action their interests will be protected and their condition improved, and to render assistance to injured members, and also provide a proper burial for deceased members." The right of the defendants to form such combinations or unions for the purpose of protecting their interests and improving their condition by securing higher wages and shorter periods of labor, even in competition with other laborers, is undisputed. *Pickett* v. *Walsh*, 192 Mass. 572, 580. *Snow* v. *Wheeler*, 113 Mass. 179. *Carew* v. *Rutherford*, 106 Mass. 1, 10. *Commonwealth* v. *Hunt*, 4 Met. 111, 129.

Nor is there now any question that the defendants had the right through concerted action to attempt to secure the attainment of these lawful objects by means of a strike. If the end aimed at is lawful, the strike is lawful, and is not made unlawful by the fact that it is ordered and carried on by the action and through the instrumentality of a labor union. This is the express point of the decision in *Reynolds* v. *Davis*, 198 Mass. 294, a decision which was made only some months ago, and which as to this point was concurred in by every member of the court, the only dissent being as to the lawfulness of the purpose of the strike which was there considered. This means and must mean that

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the members of a labor union who have engaged in a strike for a lawful purpose have a right to carry it on and to seek to make it effectual by the use of any means which are neither unlawful in themselves nor inconsistent with the exercise by others of any equal or superior rights.

It is conceded in this case that the defendants' strike was a lawful one, because it must be treated as instituted and carried on for the lawful purposes of obtaining higher wages and shorter periods of labor. We adopt as to this question what is said in the majority opinion. It follows accordingly that the defendants had a right not only to carry on their strike but to seek to make it successful by the use of whatever rightful means were available to them. And this seems to us to be the general doctrine of the cases. It has been upheld, either in terms or by necessary inference, in *Reynolds* v. *Everett*, 144 N. Y. 189; *Mills* v. *United States Printing Co.* 99 App. Div. (N. Y.) 605; *Rogers* v. *Evarts*, 17 N. Y. Supp. 264; *Downes* v. *Bennett*, 63 Kans. 653; *Longshore Printing Co* v. *Howell*, 26 Ore. 527; *Gray* v. *Building Trades Council*, 91 Minn. 171. Indeed this proposition, as we understand, is not disputed by the majority; nor has it been denied by any authoritative judicial decision.

The plaintiff in the case before us has indeed, like every other employer of labor, a right to enjoy a free labor market, to have a free flow of labor come to him, — that is, he has a right to employ such men as are willing to work for him upon such terms as may be mutually agreed upon between him and them. The strongest statements of this right may perhaps be found in some of the cases cited in the majority opinion. *Brennan* v. *Hatters of North America*, 44 Vroom, 729. *Jersey City Printing Co.* v. *Cassidy*, 18 Dick. 759, 765. *Atkins* v. *Fletcher Co.* 20 Dick. 658, 664. *Quinn* v. *Leathem*, [1901] A. C. 495, 534. But even these decisions follow the now universal current of authority in recognizing the right of the defendants to curtail and restrict this right of the plaintiff, by combining in labor unions to engage in a lawful strike for the improvement of their own conditions, and in endeavoring to render their strike successful by using all rightful means both to secure unanimity of action among their own members and to dissuade other laborers from entering the employ of the plaintiff. That is, the

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relative right of the plaintiff to enjoy a free labor market is modified and limited by the right of its employees to enter into an agreement or combination to secure higher wages or to improve otherwise the conditions of their employment, and for this purpose to engage in a strike and to use all rightful means to insure the success of their strike by checking, and if they can do so without resorting to wrongful means, by wholly stopping, the free flow of labor to the plaintiff. But, if this be so, manifestly the plaintiff's right to a free labor market is not only not a paramount right, but it is and must be subject to the higher right of the defendants to combine and to carry on a strike by the use of whatever lawful means may be in their power; and we cannot see how this right can be further limited than by restricting it to acts which are not forbidden by law, either as being unlawful in themselves or at variance with a sound public policy. Accordingly, the question now to be decided is whether we can say that the members of a labor union have no right, acting in conformity with rules previously established, to impose a fine upon one of their own members if he goes to work or continues to work for an employer against whom a justifiable strike has been declared in accordance with those rules, where there is no contractual right or duty on either side for the performance of such work.

If we are right in what thus far has been said, the answer to this question must depend upon whether the imposition of such a fine is either forbidden by some rule of law or is found to be inconsistent with some principle of public policy. But in our opinion neither of these affirmations can be made.

The right of all voluntary associations, whether formed for the carrying on of business or for purely social purposes, to establish appropriate by-laws and regulations, not only for their own internal management but also to regulate the conduct of their members towards each other and in matters affecting the general interests of the body, is conceded. And the right to enforce obedience to such by-laws and regulations by suitable penalties is generally recognized. See, besides many other cases that might be cited, *Rex* v. *Westwood*, 7 Bing. 1, 90; 2 Dow & C. 21; *Goulding* v. *Standish*, 182 Mass. 401; *McFadden* v. *Murphy*, 149 Mass. 341; *Smith* v. *Nelson*, 18 Vt. 511; *Mayer*

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v. *Journeymen Stonecutters' Association*, 2 Dick. 519; *Brown* v. *Stoerkel*, 74 Mich. 269; *Wabash Railroad* v. *Hannahan*, 121 Fed. Rep. 563; *Martin* v. *Nashville Building Association*, 2 Coldw. 418. That provisions for fines to be imposed for conduct injurious to the members of such voluntary associations are not necessarily bad either as between the members themselves or as affecting the conduct of members towards third persons was assumed in *Bowen* v. *Matheson*, 14 Allen, 499. See p. 501. And although the manifest effect of the fine provided for in that case was to put at least a certain measure of coercion upon the individual members of the association to persist in conduct which had been found to be ruinous to the plaintiff's business, the decision was restated and approved in *Plant* v. *Woods*, 176 Mass. 492, 500. The same may be said of other cases cited in that opinion. The suggestions as to the decision in *Bowen* v. *Matheson*, made in *Martell* v. *White*, 185 Mass. 255, and in the majority opinion in the case at bar, really go no farther than to say that such a fine is not necessarily unlawful; but that is exactly what is here contended for.

We cannot make the law to be enforced against labor unions in this respect more stringent than that which is applicable to other organizations established for proper purposes. Such unions are voluntary associations. They are formed for proper purposes. Their objects are not only lawful, but commendable. Like some other associations, the very purpose for which they are created makes it highly important that their members should be held together by the strongest possible bonds, so as to work with absolute unanimity, especially in the time of a trade dispute or strike. Pledges and promises binding all the members are desirable. Voluntary agreements to abide in such matters by the will of a majority of the members under a coercive pecuniary influence, or even under pain of expulsion, cannot be objectionable. Indeed, the right of labor unions to enforce, under penalty of fine or expulsion, compliance by all their members with rules and regulations which have been adopted because deemed by a sufficient majority to be for the common good and which are not in themselves inappropriate or unlawful, is necessary to their continued existence. It is to the united action of all their members that such organizations

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owe their strength and their ability to accomplish the results at which they aim. Doubtless persons who do not agree in the desirability of those results or in the wisdom or efficiency of the means adopted to secure them, cannot be required to continue as members against their will, any more than they could have been compelled to become members in the first instance. It is of the very essence of a voluntary organization that membership in it is and must continue to be itself voluntary; and this must be so on both sides as long as property rights do not come in question. *Plant* v. *Woods*, 176 Mass. 492, 502. *Flaccus* v. *Smith*, 199 Penn. St. 128. *Longshore Printing Co.* v. *Howell*, 26 Ore. 527. So long, however, as such membership continues and the organization still serves the purpose for which it was created, "the will of the individual must," as was said by the court in *Wabash Railroad* v. *Hannahan*, 121 Fed. Rep. 563, "consent to yield to the will of the majority, or no organization whether of society into government, capital into combination, or labor into coalition, can ever be effectual. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes and by organic agreement to subject the individual members to rules, regulations and conduct prescribed by the majority, is no longer an open question in the jurisprudence of this country." So Taft, J., in *Thomas* v. *Cincinnati, New Orleans & Pacific Railway*, 62 Fed. Rep. 803, 817, after conceding the right of the employees of a receiver to organize themselves into a labor union which shall take joint action as to their terms of employment, and to elect officers to represent them, says: "The officers they appoint, . . . if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory." In *Mayer* v. *Journeymen Stonecutters' Association*, 2 Dick. 519, it appeared that members of the defendant association were practically compelled to acquiesce in the decision of the majority and to join in strikes or abstain from working for particular employers by forfeiture of membership consequent upon being declared "scabs"; and this was not interfered with by the court, no other coercion or actual violence having been used.

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The same rule was applied in *Brown* v. *Stoerkel*, 74 Mich. 269, to persons suspended from a labor union for not joining in a strike. The validity of such rules as are here in question and of penalties to be imposed under them after due notice and hearing in conformity to the rules was either declared or recognized and assumed in *Pickett* v. *Walsh*, 192 Mass. 572, 575; *Fuerst* v. *Musical Mutual Protective Union*, 95 N. Y. Supp. 155; *Burns* v. *Bricklayers' Benevolent & Protective Union*, 14 N. Y. Supp. 361; *Master Stevedores' Association* v. *Walsh*, 2 Daly, C. P. 1; *Froelich* v. *Musicians Mutual Benefit Association*, 93 Mo. App. 383; and *Moores* v. *Bricklayers' Union*, 23 Weekly Law Bulletin (Ohio) 48. In *Quinn* v. *Leathem*, [1901] A. C. 495, the fines imposed were not treated as in themselves objectionable, but the decision was put upon the ground that the defendants had acted, not for any purpose of advancing their own interests as workingmen, but for the sole purpose of injuring the plaintiff in his trade. See language of Lord Stroud, p. 514. So in *Brennan* v. *United Hatters*, 44 Vroom, 729, it was assumed that the imposition of fines, even up to the amount of $500, might be lawful; but the case turned upon the fact that the plaintiff had not had such notice and trial as were guaranteed to him by the rules of the union. In *Booth* v. *Burgess*, 65 Atl. Rep. 226, the object of the fines was to enforce a strike which was merely sympathetic or in the nature of a boycott, such as was held to be unjustifiable in *Pickett* v. *Walsh*, 192 Mass. 572. In *Purvis* v. *United Brotherhood*, 214 Penn. St. 348, a strong decision against the coercion of an employer by sympathetic strikes against his customers, it was assumed throughout the opinion that the officers of the labor union would not have been prevented from enforcing by peaceful means upon their own members the rules of the union forbidding its members to work upon non-union material; and this would include the right to impose the penalties established by those rules. In *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, affirmed on appeal in [1892] A. C. 25, it appeared that conformity to the rules of the association was enforced by a penalty of dismissal, a severer and more drastic remedy than a mere pecuniary penalty, which practically could usually be enforced only by expulsion, and this fact was relied upon by the plaintiff upon the appeal (p. 30); but

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both Lord Watson and Lord Morris declined to treat this threat of expulsion as involving any wrongful intimidation (pp. 43, 49, 50). Indeed, we do not understand it to be denied that those members of the unions who declined to join in the strike which was ordered were liable to expulsion by the unions acting in good faith; and as it appears that the defendants are pecuniarily irresponsible, payment of the fines threatened could have been enforced only by expulsion. And the member of a union upon whom such a fine has been lawfully imposed in accordance with by-laws to which he has himself previously assented, is in no respect in the predicament of a highwayman's victim who has the bare option of parting with his money to save his life or of losing his life without thereby saving his money. The situation of one who finds himself compelled to choose between two alternatives, however distasteful, which he has brought upon himself and neither of which is unlawful, is in no way comparable to that of one who is compelled by wrongful force to elect between submitting to one of two alternative injuries, both of which are unlawful. An argument which rests upon such a comparison is without foundation.

Nor can we say that the imposition of fines, not in themselves unlawful and not injurious to the plaintiff except as they restrict an inferior right by the lawful exercise of a higher right, is to be regarded as contrary to a sound public policy. Gloomy vaticinations of injurious results to be apprehended from the excessive power which labor unions may acquire by their combination of many individuals into one body do not greatly impress us. The power of capital hitherto has not been found insufficient to prevent other than proper advantages from being gained by the representatives of labor, nor does it seem to us likely to be insufficient in the future. If it shall appear that there is such a danger, yet we cannot alter the law by denying to labor unions the rights and powers which the law gives to all lawful associations.

The law does not do so vain a thing as to allow the formation of labor unions and to declare their right to initiate and by lawful means to carry on a justifiable strike, and then refuse them the use of the only practical means by which their acknowledged rights can be secured. And see, beside the cases already cited, *Cote* v. *Murphy*, 159 Penn. St. 420, 430; *Bohn Manuf. Co.* v.

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Hollis, 54 Minn. 223; *Macauley Brothers* v. *Tierney*, 19 R. I. 255. The books are full of cases recognizing the right of labor unions to enforce their rules upon their members in a reasonable way. There are but few cases that discuss by-laws authorizing the imposition of fines for a violation of rules; for their validity is almost universally conceded. It is believed that most of the many thousand labor unions in this country and Great Britain have such a rule or by-law, under which they are acting to-day without complaint from any one. In such action they are in our judgment simply adopting a principle which is of general application for similar purposes.

It is true of course that no man lawfully can be compelled at the mere dictation of other men to abstain from working for such prices and during such periods of labor as he may be willing to accept; but it is no less true that when one chooses voluntarily to unite with others of the same craft in forming an organization for the purpose of bringing about by the united action of all its members more favorable conditions of employment, he is bound, so long as he desires to remain a member of that organization, to submit within certain limits his own freedom alike of judgment and of action to the judgment of his associates, and to conform his conduct to that standard which they shall have agreed to be for the best interest of all and of each. Unity of action would be impossible upon any other terms. Accordingly, all the members of such a body have a right to expect, and by reasonable rules and appropriate penalties to provide for, the observance of such terms. Those who desire to employ the members of such organizations must expect this to be the case, and have no right to complain of the requirements of such rules, and of their reasonable enforcement upon each other by the members of such organizations. To this extent, the employer's relative right to a free labor market must yield to the higher right of the laborers to combine and to act in unison for the purpose of obtaining better terms from their employer. In other words, the general right of an employer to go into the market to hire laborers does not deprive a union, in carrying on a lawful strike, of the right to use upon its individual members, for the purpose of keeping them up to the performance of their duty as such members, all the influ-

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ences that any other organization properly could use, including the imposition of fines. The right to use such influences is an independent and paramount right. The interests of the employer are subordinate to this right, and must yield to it.

Doubtless this power of discipline by fines or by the ultimate penalty of expulsion cannot properly be resorted to for the purpose of requiring conduct intrinsically unlawful, or for the purpose of compelling a minority member to join in action the ultimate object of which is to damage a third person. *Ertz* v. *Produce Exchange Co.* 82 Minn. 173. Just as the rules of an association cannot protect its members who have done actionable injury to a third person, so a plaintiff who has suffered injury by the enforcement of its rules and penalties upon its own members for a wrongful purpose may properly be allowed a remedy. *Carew* v. *Rutherford*, 106 Mass. 1, 10. If a strike should be declared for an unlawful object, it would be illegal because of its object; and all the members trying to maintain it by direct or indirect action against the employer might be liable in damages and subject to injunction. They would be so liable just as much without a by-law authorizing the imposition of fines as with one. Any labor organization acting against an employer to prevent him from carrying on his business is acting unlawfully if its action is without legal justification. The case of *Boutwell* v. *Marr*, 71 Vt. 1, might well have been put upon this ground; and in our opinion our own case of *Martell* v. *White*, 185 Mass. 255, should have been rested upon a similar doctrine. But if the object of a strike is legal and commendable, an effort to keep the members together by the imposition of fines, if need be, under a by-law previously adopted, is also legal and commendable.

The only cases that we have found which in principle are contrary to our conclusions are *Boutwell* v. *Marr*, 71 Vt. 1, the reasoning of which we regard as ill-considered and erroneous, and *Martell* v. *White*, 185 Mass. 255, in which a majority of this court followed the Vermont decision. But in *Martell* v. *White* it was assumed (p. 262) that the fine was "so large as to amount to moral intimidation or coercion," and was "used as a means to enforce a right not absolute in its nature but conditional," and was "inconsistent with the conditions upon

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which the right" rested. None of these conditions are applicable here. The findings made in this case went no further than that some coercion was exercised upon the striking members of the unions by their apprehension of fines. We have seen that the fines which were threatened were not in themselves unlawful, were in accordance with the by-laws of the unions of which the strikers were members, and were imposed in conformity with a right which was paramount to any inconsistent right of the plaintiff. We do not consider that the point actually decided in *Martell* v. *White* was necessarily inconsistent with the view here taken. So far, however, as the general doctrine of that case is applicable to fines imposed for a violation of rules lawful in themselves and not sought to be enforced for a purpose either strictly unlawful or opposed to public policy or inconsistent with the general welfare of the community, we are not willing to follow it. We do not think that the court can distinguish between the coercive effect of larger and smaller fines, or say as matter of law that they do, by reason merely of their magnitude, amount to moral intimidation. All fines are necessarily coercive in their operation, if they have any effect whatever. The statement that they may simply call the attention of a member of an organization to the fact of the infringement of some innocent regulation, or serve as an extra incentive to the performance of some absolute duty, we understand to be, and to have been manifestly intended to be, a concession that the degree of coercion which they exert in some instances may be a proper one. Perhaps unreasonable or excessive fines sometimes might be found to amount to intimidation; but we think it better to say that such fines as are here in question, not found to be excessive in amount, are not to be declared to be unreasonable or unlawful where they are imposed under rules or by-laws which are themselves proper and reasonable, are imposed for justifiable purposes, and are well adapted to serve useful ends for a paramount interest of the parties whose conduct they are to guide, and do not interfere with any absolute or superior right of a third person, or work an injury to his relative rights disproportionate to the good aimed at and reasonably expected to come by reason of them to the members of the association. *Downs* v. *Bennett*, 63 Kans. 653.

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To repeat what has already been said in substance, what seems to us the fallacy of the majority opinion is its failure to act upon the fact that the strike in this case was upon justifiable grounds, and of course was lawful. It follows that the action of each member of the union in trying to maintain the strike, without force, or wrongful coercion or intimidation exercised upon any one, was justifiable and lawful. It was not an interference with the rights of the plaintiff, because, as we have seen, the right of an employer to conduct his business without interference in the labor market is subordinate to the right of his employees to strike and to maintain the strike in a lawful manner. As against this right of the employees the employer has no right to have their labor flow to him uninfluenced or undiverted.

Accordingly, we are of opinion that the decree of the Superior Court should be affirmed.

LORING, J. For the reasons stated in the opinion of Mr. Justice Sheldon I should agree with the conclusion there reached were it not for the recent decision made by this court in *Martell* v. *White*, 185 Mass. 255.

The agreement in *Martell* v. *White* was not an agreement or combination of laborers to better their condition, but an agreement between certain manufacturers, quarriers and polishers of granite to buy and sell to and to work for each other to the exclusion of other granite manufacturers, quarriers and polishers. This court held such an agreement to be a valid one. Whether that agreement was a valid one is not now up for decision. For the purposes of this discussion I take *Martell* v. *White* to be a decision as to what means may be lawfully used to enforce a legal agreement.

In my opinion the decision in *Martell* v. *White* ought not to be overruled in the case at bar although it was wrong, provided laborers and labor unions will not suffer injustice from our standing by it.

The evils which ensue from overruling a wrong decision where no injustice is involved in following it are greater than those which come from standing by it. It would be hard to measure the disastrous consequences to the administration of justice if it

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were thought that a change in the personnel of the court is to be the occasion for rearguing what has been decided.

The decision in *Martell* v. *White* will not (in my opinion) work injustice to employees and labor unions if it is confined to the point there decided and is not extended to broader propositions.

These broader propositions are as follows: (1) That employees have a right to combine to better their condition and to do all acts (not unlawful) necessary to make the combination an efficient one. (2) That they have a right to strike to gain that end if their demands therefor are not granted by their employer, and to do all acts (not unlawful) necessary to make the strike successful. And (3) that these rights of the employees are superior to the right of the employer to have a free flow of labor in his business.

There is nothing in the decision in *Martell* v. *White*, or in the decision in the case at bar, which calls in question these propositions or any one of them.

All that was decided in *Martell* v. *White* and all that is up for decision in the case at bar is that the imposition of a fine is the use of unlawful means.

It was not decided in *Martell* v. *White* that in case a member of a labor union (which has instituted a strike to get higher wages, for example) goes to work for the employer in question at the old rate, he cannot be expelled.

Neither was it decided in *Martell* v. *White* that since the labor union, in the case put above, can expel such a member, it cannot, if he goes to work for the old rate of pay, threaten to expel him for the purpose of keeping him in the ranks of the labor union, that is to say, in the ranks of the strikers.

Further, it was not decided in *Martell* v. *White* that if a member in the case put above is subject to expulsion because he has deserted the union and gone to work for the lower rate of pay, the union is not at liberty to impose upon him the payment of a sum of money for the common benefit as a condition of his reinstatement. In such a case the union is not bound to expel the deserter. It is at liberty to take him back. On the other hand, since it can expel him and at the same time is at liberty to take him back, it can take him back on such terms as it may choose to

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impose, including the payment of a sum of money to the union for the common benefit.

And finally, since it may do this it may threaten to do this to keep such a fellow member from going back to work at the old lower rate of pay. There is nothing in *Martell* v. *White* which denies or pretends to deny this right to a labor union.

A payment imposed upon a deserting member of a labor union under the circumstances stated above is not, using words accurately, a fine. The difference is that a fine is imposed upon a former member for breaking the by-laws while he was a member, and can be collected whether the deserting member returns to the ranks of the union or not, while such a sum as is described above is a condition of the reinstatement of a member who has been expelled or is subject to expulsion, and cannot be collected if the member does not choose to be reinstated.

But although there is a difference between a fine and such a payment as is described above, the difference between the two is of no practical consequence to labor unions. So long as a labor union can impose upon a member who is subject to expulsion the payment of a sum of money as a condition of his reinstatement, the right to impose a fine (giving to that word its accurate meaning) is of no practical consequence. No labor union in the past ever attempted to collect a fine from a member who had left the union and did not seek reinstatement. And no labor union will ever find it worth while to enter on such litigation. The game is not worth the candle. It is because the difference between these two things is not of practical consequence that I think that *Martell* v. *White* should not be overruled. What we are dealing with in the case at bar are the practical rules which govern strikes properly instituted for a proper purpose. If a wrong decision has been made, it had better stand if it does not work injustice. As I have said, if the decision in *Martell* v. *White* is not extended it does not work injustice, and for that reason (in my opinion) it ought not to be overruled in the case at bar.

I am of opinion that the case at bar is covered by the decision in *Martell* v. *White*. Further that the decision in *Martell* v. *White* ought not to be overruled in this case, and that the plaintiff is entitled to the decree stated in the opinion of a majority of the court.

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THOMAS O. LOVELAND & another *vs.* CHARLES A. RAND.

Worcester. September 28, 1908. — October 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, New trial, Rehearing, Exceptions, Judge's charge. *Words*, "Against the law."

On a motion to set aside a verdict, alleging as reasons that it is against the law and against the evidence and the weight of the evidence, the trial judge may grant the motion and set aside the verdict "on the ground of misdirection in law," that being within the alleged reason that the verdict is "against the law."

If after the granting of a motion to set aside a verdict and order a new trial, the party in whose favor the verdict was returned, files a motion for a rehearing, alleging only errors in the proceedings on the motion for a new trial, some of which might have been made the subject of exception in those proceedings under R. L. c. 173, § 106, it is within the discretion of the trial judge to entertain the motion or to decline to do so; but, if he sees fit to entertain the motion and to allow exceptions to his refusals to give certain rulings requested at the hearing upon it, his action gives the parties the same right to ask for rulings and to take exceptions to rulings made by him that they had when the same questions arose upon the original motion for a new trial.

At the trial of an action where one of the defenses was that the defendant's signature to the instrument relied on by the plaintiff was procured by fraud, and another of the defenses was that the defendant did not sign the paper, the judge in the last sentence of his charge to the jury said, "If you find the defendant did sign this agreement, if you find that he did put his signature to a paper, and if you find that the paper is the paper that is alleged here, then the plaintiff has made out his case, and is entitled to damage," ignoring the other issue whether the defendant's signature was procured by fraud. In other parts of the charge instructions were given on the issue of fraud, but some of these were not very clear. On a motion for a new trial, the trial judge set aside a verdict for the plaintiff on the ground that there was a misdirection in law. *Held*, that, while there appeared to be little doubt that the judge had a correct view of the law in his own mind, there was reason to fear that the jury were misled by the statement quoted above and that the charge in its effect, as understood by the jury, was incorrect and misleading, that the trial judge, who had a much better opportunity than this court of forming a judgment on this question so decided, and there was no ground for finding error in his decision to grant a new trial.

KNOWLTON, C. J. At the trial of this case the plaintiffs obtained a verdict, and the defendant filed a motion for a new trial, alleging, as reasons for his motion, that the verdict was against the law and against the evidence and the weight of the evidence. After a hearing and argument, the judge granted the motion

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"on the ground of misdirection in law." No exceptions were taken to the rulings or refusals to rule at this hearing, or to the order granting the motion. After an interval of thirteen days the plaintiffs filed a "motion for re-hearing and reconsideration," on the ground of alleged errors of the judge in his construction of the motion and his action upon it. The judge entertained the motion and, after a hearing upon it, denied it. The plaintiffs requested certain rulings at this hearing which the judge refused, and they excepted.

One question that arises is whether the reasons stated in the motion for a new trial would warrant setting aside the verdict on the ground of misdirection in law. A new trial cannot be granted for a reason which is not stated in the motion. R. L. c. 173, § 112. *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223, 229. One of the reasons stated in this motion is that the verdict was against the law. The substance of the reason for granting the motion is that the verdict was founded on an erroneous view of the law, stated by the judge to the jury in his charge. Was such a verdict against the law? The plaintiffs contend that the words "against the law," in the motion, mean only against the law as stated by the judge to the jury in his charge, and that they authorize the granting of a new trial, only for a departure by the jury from the rules of law laid down by the presiding judge. There are decisions in some courts which tend to support this contention, but all or nearly all of them were made under codes very different from our statutes, and they apply to motions for a new trial which are a part of the regular procedure for bringing before a higher tribunal questions of law that were raised and properly saved at the trial. They require a definite statement of the question of law intended to be raised.

Motions for a new trial under our system are of a different kind. By the St. 1804, c. 105, § 5, provision was made for taking exceptions at trials before the Supreme Judicial Court and for presenting the questions of law to the full court by a bill of exceptions. When the Court of Common Pleas was established by the St. 1821, c. 79, a similar provision was made in §§ 5, 6, for saving questions of law in that court and presenting them to a higher tribunal. The system thus established has been con-

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tinued to the present time, and it is the regular method of obtaining a revision of the rulings of a court upon questions of law in trials before juries as well as in some other trials and hearings. R. L. c. 173, § 106. Except as affected by these and kindred statutes, motions for a new trial, as recognized at common law, are still permitted. R. L. c. 173, §§ 112, 113. In the St. 1821, c. 79, § 7, the Court of Common Pleas was authorized to grant a new trial "for any cause for which, by the common law, a new trial may now be granted"; and "when, upon due examination, it shall appear to said court that justice has not been done between the parties." The jurisdiction to grant new trials upon motion still exists in the Supreme Judicial Court and the Superior Court. But under our present system this is not the way to bring up for rehearing questions of law that were raised, or that might have been raised, at the trial before the verdict was rendered. Usually such motions are addressed solely to the discretion of the court. Under our decisions a question that was raised, or that might have been raised, before a verdict, cannot be raised upon a motion to set aside the verdict and grant a new trial. *Commonwealth* v. *Morrison*, 134 Mass. 189. *Murphy* v. *Commonwealth*, 187 Mass. 361. *Parker* v. *Griffith*, 172 Mass. 87. *Garrity* v. *Higgins*, 177 Mass. 414. *Fitch* v. *Jefferson*, 175 Mass. 56. *Holdsworth* v. *Tucker*, 147 Mass. 572. The statute provides that exceptions may be taken to rulings on questions of law at hearings upon motions for a new trial. R. L. c. 173, § 106. But as was said in *Commonwealth* v. *Morrison*, *ubi supra*, and in other cases, these are not to rulings that were given or refused, or that might have been asked for and given or refused, at the trial before the verdict. They are to rulings upon questions arising for the first time at the hearing on the motion for a new trial.

Until the enactment of the St. 1897, c. 472, now embodied in the R. L. c. 173, § 112, it was in the power of a judge, either with or without a motion for a new trial, to set aside a verdict which in his opinion was founded on an erroneous view of the law, or was against the evidence and the weight of the evidence. Indeed, speaking generally and following with some strictness of construction the language quoted above from the St. 1821, c. 79, § 7, it was in his power, in the exercise of his discretion,

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to set aside the verdict when, if allowed to stand, it would work injustice such as the courts ought not to tolerate. *Ellis* v. *Ginsburg*, 163 Mass. 143. The St. 1897, c. 472, (R. L. c. 173, § 112,) was not intended to limit the jurisdiction of the court as to the causes for which new trials may be granted, but only to limit its action to cases in which a motion is made stating the reasons for making the motion. In reference to the statement of the reasons, ought this statute to be construed narrowly and strictly, or broadly and liberally? In dealing with a matter not of strict legal right, but appealing only to the discretion of the court, a statement that the verdict is against the law would have been construed broadly in this Commonwealth before the enactment of the St. 1897, c. 472, and would have been sufficient to open for consideration by the court a contention that the verdict was founded upon an erroneous principle of law, whether from a disregard by the jury of the instructions of the court, or from erroneous instructions which naturally led to a wrong result, or from any other fundamental legal error which entered into the decision embodied in the verdict. In *Bowen* v. *State*, 108 Ind. 411, it was held that an averment that the finding or decision of the court is contrary to law, on a motion for a new trial, is a proper method of saving the point that a trial has been had without arraignment or plea. It would be a narrow construction of the language of such a motion under our system to hold that the words "against the law" include nothing but a disregard by the jury of the instruction of the judge. The construction to be given to the language in such a motion, appealing only to discretion, ought to be less strict than it would be if the language were used to present to an appellate tribunal for final decision a question of strict legal right. The party opposing the motion should understand that a statement of reasons would bring up, for the exercise of discretion, everything fairly included in its meaning under a broad and liberal interpretation. If in doubt as to the specific matters intended to be relied upon, he should file a motion for further specifications, upon which the court would make any necessary order for his protection.

We are of opinion that the reason given by the judge for the allowance of the motion was within the statement of reasons contained in the motion.

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The motion for a rehearing, which alleged only errors in the proceedings on the motion for a new trial, some of which might have been made a subject for exception in these proceedings, was addressed to the judge's discretion, and he well might have declined to entertain it. Upon such a motion he was not bound further to consider matters which he had already fully considered and finally decided in the earlier proceedings. But he saw fit to entertain it and to allow exceptions to his refusals to give certain rulings requested. We think his action should be treated as giving parties the same right to ask for rulings and to take exceptions that they had when the same questions arose upon the original motion. One of these questions was whether there had been any misdirection of the jury in matters of law at the trial. This question first arose upon the motion for a new trial. The direction given to the jury was favorable to the plaintiffs, and they could not except to it at the trial. When the judge at the hearing decided that it was a misdirection which called for a new trial, the plaintiffs were first aggrieved, and were entitled to an exception. They having failed to take an exception at that time, and having been permitted to make the request for a ruling on the motion for a rehearing, and their exception to the refusal to rule having been allowed by the judge, we think this exception open to them here.

The question arises upon the charge of the judge, and the difficulty in deciding it results from different language in different parts of the charge, bearing upon the law applicable to a defense founded upon the fraudulent procurement of the defendant's signature to the instrument relied on by the plaintiffs. What we understand to be the last sentence in the charge, upon the question of liability, is as follows: "If you find the defendant did sign this agreement, if you find that he did put his signature to a paper, and if you find that the paper is the paper that is alleged here, then the plaintiff has made out his case and is entitled to damages." One of the defenses was that the defendant did not sign the paper. The other was that if he signed it, his signature was obtained by fraudulent representations and by trickery and sleight of hand. The quoted sentence ignored the second ground of defense, and, taken as a complete statement for the guidance of the jury, was plainly wrong. In

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other parts of the charge instructions were given upon the second issue, some of which were not very clear. While we have little doubt that in his own mind the judge had a correct view of the law, there is reason to fear that the jury were misled by the statement quoted above, and that the charge, in its effect, and as they understood it, was incorrect and misleading. The trial judge so decided. His opportunity of forming a judgment on this question was much better than ours is, and great weight should be given to such a decision by a judge who sat at the trial.

The exception to the ruling upon this part of the case is overruled, and the other exceptions are no longer material.

Exceptions overruled.

C. E. Tupper, for the plaintiffs.

J. A. Stiles, for the defendant.

VINCENZO DIMAURO, administrator, *vs.* LINWOOD STREET RAILWAY COMPANY.

Worcester, September 29, 1908. — October 29, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Gross, Street railway, Causing death.

Statement by LORING, J., of what this court has decided to be the "gross negligence" of a servant, agent or employee, which, when it causes death, is the basis of an action on behalf of the widow or next of kin of the person whose life is lost against the employer of the person who was grossly negligent.

At the trial of an action of tort against a street railway company to recover for the death of the plaintiff's intestate, which was alleged to have been caused by his being run over by reason of gross negligence on the part of the motorman of a car of the defendant, there was evidence tending to show that the plaintiff's intestate was an Italian, who at the time of the accident was working in a trench which was being dug for sewer pipes in a highway, that at the side of the trench was a pile of gravel and stones and, beyond it, the defendant's tracks; that just before the accident a tip cart had been driven upon the pile of gravel and stones and the plaintiff's intestate and others were engaged in the work of causing it to dump its load, the plaintiff's intestate bending over and pushing down on one end of the cart and having his back toward the direction from which the car came, that the hubs of the cart wheels were at least three feet from the nearer rail of the street railway track, and that the overhang of the defendant's car was not

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more than twelve inches; that the foreman under whom the plaintiff's intestate was working, seeing the car approaching, called out to the motorman, who was looking in his direction all the time, to stop, and, upon his failing to slacken his speed, motioned to him with his hand to stop, and then called to the plaintiff's intestate to "look out for the car"; that thereupon the plaintiff's intestate straightened up and brought his body so near the track that the car struck him upon the hip, whereupon he fell, rolled under the car and was killed, his body being dragged at least eight feet and the car running at least forty-six feet after it struck him; that the motorman was under orders from the defendant's superintendent to run not faster than four miles an hour when passing the sewer excavation, and that at the time of the accident he was disobeying the order and that the car was going faster than five miles an hour. One witness testified that the car was going "in a hurry; fast." *Held*, that the evidence would not warrant a finding that the motorman was guilty of gross negligence.

TORT to recover for the death of the plaintiff's intestate who, it was alleged, while he was working as a laborer in a street on June 22, 1906, was run over and killed by a car of the defendant because of gross negligence on the part of the motorman. Writ in the Superior Court for the county of Worcester dated October 18, 1906.

There was a trial before *Dana*, J. At the close of the evidence introduced on behalf of the plaintiff, the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

The facts are stated in the opinion.

M. M. Taylor, for the plaintiff.

I. McD. Garfield, for the defendant.

LORING, J. We are of opinion that the evidence did not warrant a finding of gross negligence on the part of the defendant's servants.

In view of the argument made in the case at bar we repeat what has been decided: First. It was decided in *Banks* v. *Braman*, 188 Mass. 367, that gross negligence under R. L. c. 111, § 267, is not the same thing as a wanton act which dispenses with proof by a plaintiff of the fact that his negligence was not a contributory cause of the accident. See in this connection *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32, 35, and a note to *Dolphin* v. *Worcester Consolidated Street Railway*, 189 Mass. 270, 273, and a note to *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 159, 162. Second. Gross negligence as distinguished from ordinary negligence was created by the act under which this action was brought, (R. L. c. 111, § 267,) and exists by force of the provisions of that statute. See

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Dolphin v. *Worcester Consolidated Street Railway*, 189 Mass. 270, 273. Third. In *Dolphin* v. *Worcester Consolidated Street Railway*, *ubi supra*, where the degree of care due was the highest degree of care, the defendant being a carrier and the plaintiff one of its passengers, it was held by the court that gross negligence means a gross failure to exercise the highest degree of care. Where the duty owed by the defendant is to exercise ordinary care, gross negligence has been defined to be "a materially greater degree of negligence than the lack of ordinary care." See *Brennan* v. *Standard Oil Co.* 187 Mass. 376, 378; *Manning* v. *Conway*, 192 Mass. 122, 125; *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32. In such a case gross negligence may also be defined to be a failure to exercise a slight degree of care.

The evidence introduced by the plaintiff showed that his intestate, one Paciello by name, was killed by a car of the defendant under the following circumstances. He was a member of a gang of some twenty-five to thirty Italians engaged in digging a trench for sewer pipes. This trench was in a public way between Linwood, a station on a steam railroad, and the town of Whitinsville. In this same public way the tracks of the defendant were laid. On the day in question a heap of gravel and cobble stones, some three feet high in the middle of the heap, had been made by the dumping of material which came from the digging of the trench. Several teams had dumped loads at this place before the team in question came there to dump its load. The method of dumping had been for the successive teams to drive up on to the gravel previously dumped, and then dump its load. The plaintiff's intestate and another Italian, Delgrosso by name, were digging in the trench when the team in question drove up on to the heap of gravel. It was a four wheel dump cart. Paciello and Delgrosso left the trench to help dump this load of gravel. The horses and cart had come to a stop parallel to the defendant's track, with the tracks on the left of the team as the team stood facing Linwood. Rosetti, the foreman of the gang, stood at the front of the team, prying up the forward end of the dump cart with an iron bar. Paciello and Delgrosso were at the back of the cart, one on each side of it, bearing down on that end to help dump the gravel.

Rosetti testified that he saw the defendant's car when it was

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one hundred feet away, and that he then called out for it to stop. Seeing that there was no change in its speed, he signalled it to stop by raising his hand, but the car continued to come on at the same rate of speed. He also testified that the motorman was looking in his direction all the time.

It was proved that the defendant had issued an order, properly posted, that cars "should not run exceeding four miles an hour by the sewer construction."

In addition there was evidence from an expert as to a hypothetical case, covering what the jury were warranted in finding to be the facts in the case at bar, that a motorman with a slack brake chain ought to have been able to stop the car running four miles an hour within twenty feet, and at five miles an hour within twenty-seven feet.

The only testimony as to the speed at which the defendant's car was running, in addition to what has been stated, came from Delgrosso, who said that the car was coming all the time at the same rate of speed; "in a hurry; fast."

This warranted a finding that the defendant's car was going faster than five miles an hour. That fact, in connection with the defendant's rule that its cars should not run over four miles an hour while going by sewer construction, would have warranted a finding that the motorman was negligent within the rule established in *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476.

The evidence put the hub of the rear wheel of the dump cart "about three to four feet from the track," and the overhang of the defendant's car at ten to twelve inches. This left a clearance of two to three feet between the hub of the wheel and the defendant's car. Paciello was on the side of the dump cart facing toward Linwood, that is to say, with his back toward Whitinsville, where the car in question was coming from. He was bending over, bearing down on the end of the cart (as we have said) when Rosetti the foreman called out to him, "*guarda tevo per carro*," or "*guarde tevo del carro*," which being translated means "look out for the car" or "look out for the cart." Thereupon Paciello straightened up, looked round over his right shoulder, and in doing so brought his body over the line of the outside of the defendant's car, was struck on the hip, rolled over

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and was killed by the rear wheels. Rosetti's exact words were: "He moved his body or the car would not have touched him." The distance from the place where Paciello was struck to the place where he lay dead was from eight to ten feet, and the back end of the car, when it came to a stop, was ten to twelve feet from the body of Paciello where it lay dead. The car was twenty-eight feet long, so that from the place where Paciello was struck to the place where the front of the car, the part which struck him, stopped was about fifty feet.

The question here is whether this evidence warranted a finding of gross negligence on the part of the motorman, and we are of opinion that it did not. It is true that the jury were warranted in finding that the motorman saw or ought to have seen Paciello. But it is also true that there was a clearance of two to three feet between the hub of the wheel and the motorman's car, and that Paciello would not have been hurt if he had stayed where he was and not swung himself out into the line of the side of the car just as the car reached him. To run a car at something over five miles an hour under these circumstances is not, in our opinion, evidence of gross negligence.

The plaintiff's counsel contended that the evidence in the case at bar was stronger than that in the following cases: *Commonwealth* v. *Vermont & Massachusetts Railway*, 108 Mass. 7; *Tilton* v. *Boston & Albany Railroad*, 169 Mass. 253; *Young* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 33; *Walsh* v. *Boston & Maine Railroad*, 171 Mass. 52, 56; *Lutolf* v. *United Electric Light Co.* 184 Mass. 53, 58; *Hartford* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 365; *Hale* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 84. We have examined these cases and find that they do not support that contention.

Exceptions overruled.

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PAUL H. GRAHAM & others *vs.* WILLIAM W. ROBERTS.

Essex. November 5, 1908. — November 12, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Constitutional Law. Municipal Corporations. Haverhill.

Article 2 of the Articles of Amendment to the Constitution of the Commonwealth recognizes the right and duty of the General Court to determine what powers, privileges and immunities should be granted to any city for its regulation and government, and secures to the inhabitants the right to give or withhold their consent to the establishment of a new municipal government, making it plain that different cities may be established with different kinds of government, different officers and different modes of electing them.

St. 1908, c. 574, amending the charter of the city of Haverhill, is constitutional.

St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional or invalid because it restricts the printed names on the official ballot for the mayor, the aldermen and the members of the school committee of that city to the two highest candidates for each office as determined by a preliminary election for nominations, nor because it denies the right to have printed on the ballot the name of a candidate nominated by a caucus of a political party, nor because it denies the right to have printed on the ballot the name of a candidate nominated independently, nor because it denies the right to have printed on the ballot a specification of a candidate's party or of the political principles which he represents, nor because it requires a candidate to sign and swear to a request that his name be printed as such candidate on the official ballot to be used at the preliminary election for nominations and to file a petition of qualified voters in which they certify that he is of good moral character and qualified to perform the duties of the office.

St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional or invalid because the officers elected thereunder are subject to removal by an election of the voters of the city called and held under the provisions of that act.

St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional because of its provision that it should not take effect until it was accepted by the voters of Haverhill.

St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional by reason of its provisions for the so called initiative and referendum in regard to the adoption of ordinances.

The provisions of the Constitution which forbid the adoption of the so called initiative and referendum in general legislation do not extend to the making of by-laws and ordinances by towns and cities under the authority of the Legislature in regard to matters of local concern.

TWO PETITIONS, each by ten taxpayers and qualified voters of the city of Haverhill, the first for a writ of mandamus addressed to the clerk of that city commanding him not to prepare

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and distribute the ballots for the election of officers in accordance with the provisions of St. 1908, c. 574, entitled an act to amend the charter of the city of Haverhill, and the second for a writ of certiorari to quash the proceedings of the city clerk in certifying to the records of an election about to be held under the provisions of that statute, the petitioners in both cases seeking to have St. 1908, c. 574, which was accepted by the voters of Haverhill at an election held in conformity with its provisions, declared unconstitutional.

The cases came on to be heard together before *Sheldon*, J., who with the consent of the parties reserved them for determination by the full court, such disposition to be made of them as justice might require. It was stated in the reservation that the right of the petitioners to bring the petitions was not questioned and that the sole question presented was the constitutionality of the act.

E. S. Abbott, (*D. J. Linehan* with him,) for the petitioners.

B. B. Jones, (*J. J. Winn & O. J. Carlton* with him,) for the respondent.

KNOWLTON, C. J. The only question presented by the report of the single justice upon these petitions is whether the statute of 1908, c. 574, which is an act to amend the charter of the city of Haverhill, is constitutional. The statute prescribes a very radical departure from the methods of municipal government which hitherto have been practised in Massachusetts and in most of the cities of the other States. It is at least very doubtful whether the practical working of this system, which appears in our legislation of this year for the first time, will be satisfactory to the people who have voted to adopt it; but the question before us is not whether the provisions of the statute are well adapted to conditions existing in the city of Haverhill and likely to give the people a beneficent and well ordered government, but whether they are within the constitutional power of the Legislature to enact.

The principal contention of the petitioners is that they are in conflict with Article 9 of the Declaration of Rights of the Constitution of Massachusetts, which is as follows:

"All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall

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establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

The petitioners seem to construe this article not only as applying generally to elections of municipal officers, but as meaning that the inhabitants of different cities in different parts of the Commonwealth shall all have an equal right to elect the same number and kind of municipal officers, and to be elected to the same offices, as the inhabitants of any other city in the Commonwealth. This is not the true construction of the article. While all inhabitants having the prescribed qualifications have absolutely equal rights in reference to the election of the officers of the State government, the Constitution recognizes the fact that a proper application of the principle of local self-government may call for the election of different officers, and for their election in different ways, in different cities of the Commonwealth.

Article 2 of the Articles of Amendment is in part as follows:

"The General Court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this Commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the Constitution, as the General Court shall deem necessary or expedient for the regulation and government thereof, . . . Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon," etc.

This recognizes the right and duty of the General Court to determine what powers, privileges, and immunities should be granted to any city for the regulation and government of it, and secures to the inhabitants the right to give or withhold their consent to the establishment of the new municipal government. This makes it plain that different cities may be established with different kinds of government, different officers, and different modes of electing them. As was said in *Larcom* v. *Olin*, 160 Mass. 102, "the number of the population, the territorial situation, the pursuits and character of the people, their traditions and peculiar town institutions, as well as the probable future

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growth of the town, all may well be considered by the General Court, not only in deciding whether a city government should be established, but, if established, what the provisions of the charter should be." So in the *Opinion of the Justices*, 138 Mass. 601, 603, we find this language: "The power of the Legislature to make or to authorize local laws for the administration of local affairs is beyond question. It has the right to make local laws to meet the peculiar exigencies of any part of the community. The qualifications required to fill an office in one place may be different from those required for a similar office in other places," etc. In *Cole* v. *Tucker*, 164 Mass. 486, 489, 490, the court says: "There is nothing in the Constitution which requires that the laws regulating elections for city and town officers shall be uniform throughout the Commonwealth, and in some respects the laws regulating elections in cities for city officers have always been different from those regulating elections in towns for town officers. . . . In matters which concern the form of holding elections for city and town officers, in the absence of anything in the Constitution prescribing the manner in which such elections shall be held, we are of opinion that the provisions need not be the same for all the cities and towns of the Commonwealth." The statute before us does not assume to give the voters of Haverhill the right to vote for the same officers, and in the same way, as the voters of other cities in the Commonwealth, but the right to vote for such officers, and to vote for them in such a manner, as the Legislature and a majority of the voters of Haverhill have determined to be for the best interests of the inhabitants of that city. It gives to all the voters of that city absolutely equal rights to elect others to offices, and to be elected themselves, in accordance with the system of municipal government which is established there for all alike.

The petitioners contend that the rights of inhabitants of Haverhill are not equal to the rights of other inhabitants of the Commonwealth in the following particulars, namely:

"1. Restricting printed names on the ballot to the two highest candidates for an office in a preliminary election for nomination.

"2. Denying right to have printed on the ballot the name of the candidate nominated by the caucus of a political party.

"3. Denying right to have printed on the ballot the name of

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the candidate nominated independently of a party caucus by nomination papers.

"4. Denying right to have printed on the ballot a specification of the candidate's 'party or political principle which he represents, expressed in not more than three words.'

"5. Requiring the man to seek the office — no longer can the office seek the man — and to request and swear before his name can go on the ballot, and to have a petition of qualified voters in which they certify that they believe him to be of good moral character and qualified to perform the duties of the office.

"6. Requiring men to accept an office of uncertain tenure with liability to be recalled at any time without just cause, or for a legislative, executive or judicial act."

The first five of these particulars are merely regulations of the methods of voting. First, for the final election, an official ballot is prescribed. Then a preliminary election for nomination is provided, to determine what names shall appear on the final official ballot. General provisions for a similar object are found in our law for voting by the Australian ballot, the constitutionality of which has been affirmed. *Cole* v. *Tucker*, 164 Mass. 486.

The regulation that only the names of the two candidates chosen at the preliminary election shall appear on the final official ballot is simply a regulation for the election, which the Legislature and the people may adopt, and the same is true of the prohibition of the use of the names of candidates nominated by nomination papers, or by a caucus of a political party. Of the same kind is the prohibition of a statement of the candidate's party or political principle. It is not unreasonable, at least it is a regulation which constitutionally may be made, that no one shall be entitled to have his name go on the official ballot for the preliminary election unless he affirms in writing that he is a candidate. It is not unreasonable to require that only persons believed to be of good moral character and qualified to perform the duties of the office shall be accepted as candidates whose names are to go upon the official ballot, and that as many as twenty-five voters shall request that a candidate's name be put upon the ballot before it shall be placed there. There is no constitutional restriction upon the power of the General Court to fix the qualifications of city officers. *Opinion of the Justices*,

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138 Mass. 601, 603. *Larcom* v. *Olin*, 160 Mass. 102, 108. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 386. *Opinion of the Justices*, 165 Mass. 599, 601. There is a space for writing in names not printed on the ballot. This secures the right of every one to vote as he pleases, and the requirements limiting the names that are to be printed on the ballot are within the power of the Legislature. That was settled in regard to the Australian ballot in *Cole* v. *Tucker*, 164 Mass. 486, and *Miner* v. *Olin*, 159 Mass. 487. See also *Eckerson* v. *Des Moines*, 115 N. W. Rep. 177; *In re Pfahler*, 150 Cal. 71; *Brown* v. *Galveston*, 97 Texas, 1.

The sixth objection is not well founded. It is within the power of the Legislature, in the absence of constitutional restriction, to shorten the term of a public office, or to abolish the office during the term of an incumbent. In *Taft* v. *Adams*, 3 Gray, 126, Chief Justice Shaw said: "Where an office is created by law, and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require." See also *Opinion of the Justices*, 117 Mass. 603, 604; *Donaghy* v. *Macy*, 167 Mass. 178; *Opinion of the Justices*, 165 Mass. 599, 601.

The Legislature might constitutionally prescribe that the act should not take effect until it was accepted by the voters of Haverhill. This was a matter of local concern, which is an exception to the rule that general legislative authority cannot be delegated. The question whether the Australian ballot shall be adopted may be referred to the voters of a town. *Cole* v. *Tucker*, 164 Mass. 486. See also cases cited in *Opinion of the Justices*, 160 Mass. 586. Whatever may be thought of the question whether the voting of women at an election of town officers in a particular town is a matter merely of local concern or is of general concern to the whole State, about which the justices differed in the opinions last cited, we think it plain that the adoption of an amended city charter of this kind is strictly a local matter. Indeed, the provision requiring the consent of the inhabitants to the creation of a city in article 2 of the Amendments to the Constitution, quoted above, tends to confirm this view. See also *Stone* v. *Charlestown*, 114 Mass. 214; *Wales* v.

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Belcher, 3 Pick. 508; *Commonwealth* v. *Hilton*, 174 Mass. 29. For statutes illustrative of the principle, see St. 1907, c. 560, §§ 145, 113, 108–143, 362, 363, 364, 367, 368; St. 1906, c. 252, § 1. The passage of statutes to take effect only in such towns as vote to accept their provisions has been common for many years.

The provision for the so called initiative and referendum in regard to the adoption of ordinances is not unconstitutional. Legislation in towns, by by-laws, in regard to subjects strictly of local concern, has been a part of the law of Massachusetts from the earliest times. *Opinion of the Justices*, 160 Mass. 586, 590. Whether such legislation shall be inaugurated by the people, or entirely by a representative body or board of officers, is a matter of regulation in regard to which our Constitution is silent. It is therefore for the General Court to determine by enactment.

The provisions of the Constitution which forbid the adoption of the so called initiative and referendum in general legislation do not extend to the making of by-laws and ordinances by towns or cities under the authority of the Legislature, in regard to subjects of local concern. *Opinion of the Justices*, 160 Mass. 586, 589.

Petitions dismissed.

BARLOW MANUFACTURING COMPANY *vs.* SAMUEL STONE.

Hampden. September 21, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Construction, Entire or separable. *Damages*, Recoupment.

While it is true that the question, whether a contract is entire or separable, is one of intention, the general rule is that, where the part of the contract to be performed by one party consists of the delivery of several distinct and separate articles, the price to be paid for which is apportioned to each item according to the value thereof and not as one unit in a whole, or as a part of a round sum, the contract will be regarded as separable.

The declaration in an action of contract was on an account annexed which contained several items of "coat stands," "hat stands," "hooks" and "sundries cases," with a separate price stated for each item. The answer stated that the defendant "purchased goods of the plaintiff which the plaintiff" delayed the delivery of, causing the defendant damage, which he sought to recover in

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recoupment. At the trial, it appeared that the goods which the defendant contended were delayed in delivery were not among those described in the declaration, but were a number of wall cases, which were ordered at the same time as the other goods, but at a separate price. It also appeared that all of the goods ordered were of the same general nature, namely, store fixtures and furniture, that $25 was paid on account of the entire order when it was given, and that the wall cases were paid for separately at the time of their delivery at the price previously agreed upon. Evidence as to delay in the delivery of the wall cases and consequent damage to the defendant was excluded, and the defendant excepted. *Held*, that the exception must be overruled, since the contract was separable and the agreement to deliver the wall cases was not, as matter of law, a part of the contract of the plaintiff to deliver the goods described in the declaration, and therefore the damages which the defendant sought to recoup were not suffered in the performance of the contract which was the basis of the action.

CONTRACT upon an account annexed. Writ in the Superior Court for the county of Hampden dated April 21, 1906.

The account annexed to the declaration contained two items of "coat stands" variously described, three items of "hat stands" of different descriptions, one item of "hooks," and an item of "sundries cases" with a detailed description. Opposite each item was stated the amount to be paid for the goods contained therein. All the items but the last were dated February 7, 1906. The last item was dated February 12, 1906. The bill of exceptions stated that "the goods described in the declaration and certain wall cases, not described in the declaration," were ordered "on or about January 23, 1906."

The case was tried before *Crosby*, J., without a jury, who, as stated in the opinion, admitted *de bene* certain evidence which he afterwards excluded. He found for the plaintiff for the full amount claimed in the declaration; and the defendant alleged exceptions. The facts are stated in the opinion.

The case was submitted on briefs.

F. A. Pease, for the defendant.

N. P. Avery, for the plaintiff.

MORTON, J. This is an action of contract to recover upon an account annexed for certain store fixtures and furniture furnished by the plaintiff to the defendant. At the same time that the goods described in the account were ordered, certain wall cases were also ordered by the defendant of the plaintiff, and the defendant paid $25 on account on all of the goods ordered. The articles in suit were delivered to and accepted by the de-

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fendant, and no fault is found in regard to them as to price, quantity or quality, or the time of delivery. Nor is any fault found as to the price, quantity or quality of the wall cases. But the defendant contends that it was agreed that all of the articles should be delivered promptly, that the wall cases were not so delivered, and that he was damaged thereby and is entitled to recoup in this action the damages thus sustained. There was evidence tending to show that the wall cases were to be ordered by the plaintiff from Michigan, and were so ordered, and were delivered to and accepted by the defendant and were paid for by him pursuant to a draft therefor with a bill of lading attached drawn on him by the plaintiff.

The defendant concedes that the right to recoupment does not extend to any transaction which is not involved in this suit. But he contends that the purchase of the goods, including the wall cases as well as those in suit, constituted an entire contract which has not been severed by the act of the parties or otherwise, and that he therefore can recoup in this action the damages sustained by reason of the failure of the plaintiff to deliver the wall cases promptly as agreed.

The first question, therefore, is whether the contract was or was not an entire contract. If the contract was an entire one and there has been no severance of it, then the right to recoup is clear. *Sawyer* v. *Wiswell*, 9 Allen, 39. If it is not an entire contract, then it is equally clear that no right of recoupment exists.

Primarily, the question whether a contract is entire or separable is one of intention. But the general rule is that where the part to be performed by one party consists of several distinct and separate items and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole, or a part of a round sum, the contract may and will be regarded as severable. And this rule holds true, even though the contract may be in a sense entire, if what is to be paid is clearly and distinctly apportioned to the different items as such, and not to them as parts of one whole. *West End Manuf. Co.* v. *Warren Co.* 198 Mass. 320. *Young & Conant Manuf. Co.* v. *Wakefield*, 121 Mass. 91. *Robinson* v. *Green*, 3 Met. 159. *Miner* v. *Bradley*, 22 Pick. 457. *Badger* v. *Titcomb*, 15 Pick.

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409. *Pierson* v. *Crooks*, 115 N. Y. 539, 555. 2 Parsons on Contracts, (9th ed.) 517. Hammond on Contracts, § 463. For a case in which it was held that the contract was entire although possessing elements of divisibility, see *Stewart* v. *Thayer*, 168 Mass. 519.

In the present case the articles sued for and the wall cases were all ordered at the same time, and $25 was paid on account generally. But the articles themselves, though of the same general nature, namely, store fixtures and furniture, were entirely separate and distinct from each other, except so far as they formed parts of the same lot, and the price for each article was different from that of the other articles, except as aforesaid, and the amount which would be due from the defendant to the plaintiff had to be ascertained, not with reference to some unit of value, but by adding together the amounts to which the different articles came at the prices agreed upon. There was no agreement to sell or buy the articles ordered for a round sum, but the articles were bought and sold at the prices affixed to each. In effect there was, as said in *Young & Conant Manuf. Co.* v. *Wakefield*, *supra*, a contract for each article or lot of articles sold, and the defendant's contention that the contract was an entire one cannot therefore be sustained. The fact that the goods were all ordered at one and the same time, and that $25 was paid on account, though tending to show that in a sense the contract was entire, does not show that it must be so construed as matter of law. The act of the plaintiff in crediting the $25 on the account in suit has no material significance one way or the other. It was the only thing that he could do after the defendant had paid for the wall cases. It follows that the ruling of the judge excluding the evidence that was admitted *de bene* in regard to the matter of damages was correct. This view of the case renders it unnecessary to consider whether there was evidence which would have warranted the finding of a severance, if the contract had been entire.

Exceptions overruled.

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MILDRED L. ROLLINS *vs.* WALTER H. QUIMBY.

Worcester. September 29, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Deceit. Fraud. Estoppel. Sale, Caveat emptor.

A statement by the seller of a mortgage that it is a first mortgage, made to induce its purchase when he knows it to be a second or a third mortgage, is a representation of a material fact and not mere seller's talk.

If a married woman and her husband acting as her agent, both of whom are inexperienced in business, are induced to exchange a farm and live stock, belonging to the woman, for three mortgages by false and fraudulent representations of the owner of the mortgages that they are "first mortgages just as good as money in the bank," when in fact one of the mortgages is a second mortgage and another of them is a third mortgage, and, in making the exchange relying on this representation of the seller of the mortgages, they are led by their confidence in him to refrain from making an examination of the papers and by his assurance that it is unnecessary to employ a lawyer are led to refrain from doing so, the woman is not precluded, by the fact that she and her husband did not examine the records in the registry of deeds nor by the fact that they did not read the provisions of the mortgages, from recovering any damages which she may have sustained in consequence of the fraud.

TORT for the conversion of property of the plaintiff alleged to have been obtained from her by false and fraudulent representations made by the defendant. Writ dated April 6, 1907.

The defendant filed a motion for specifications, in answer to which the plaintiff filed an amendment, which in substance was a declaration for deceit, alleging that the defendant, in order to induce the plaintiff to exchange a certain farm situated in the town of Dudley and the live stock thereon for certain mortgages, falsely and fraudulently represented to the plaintiff that the mortgages were first mortgages, and that the mortgagor had paid interest regularly on the notes secured by them, whereas in fact the defendant knew that they were not first mortgages and that the interest had not been paid on the notes; that the plaintiff relying on these statements and believing them to be true thereby was induced to exchange the farm and the live stock for the mortgages and the mortgage notes to her great damage, and that as soon as she became cognizant of the fraud practised upon her she immediately rescinded the exchange and offered to the defendant the assignment of the mortgages and the notes.

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In the Superior Court the case was tried before *Gaskill*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions. It was agreed at the time of the trial that the jury should decide whether the property had been obtained by the alleged false and fraudulent representations, and that, if the answer was in the affirmative, the case was to be sent to an assessor for assessment of the damages, whose decision as to the damages should be final.

The case was submitted on briefs.

J. A. Thayer, *C. B. Perry & A. R. Greeley*, for the plaintiff.

M. M. Taylor, for the defendant.

MORTON, J. The evidence warranted a finding that the plaintiff was induced to sell the farm and live stock by representations made by the defendant, that the mortgages which he proposed to trade for the farm and stock "were first mortgages just as good as money in the bank," and that these representations were in part at least false and fraudulent. One of the mortgages was a first mortgage for $500 on real estate in Stoneham; one was a second mortgage for $2,200 on real estate in Worcester; and the other was a third mortgage for $2,300, also on real estate in Worcester. The defense is that the damages, if any, which the plaintiff has sustained, were the result of her own negligence and that of her husband who acted as her agent. There was no testimony as to the value of the properties subject to these mortgages and the adequacy or inadequacy of the mortgages as security for the amounts named, and the plaintiff's case must stand or fall, therefore, on the representation that they were first mortgages.

The law does not attempt to save parties from the consequences of their own improvidence and negligence; but it looks with even less favor upon misrepresentation and fraud. And, accordingly, in later decisions, this court has manifested a disinclination to extend the immunity of vendors for statements or representations made by them beyond the limits already established. *Boles* v. *Merrill*, 173 Mass. 491. *Kilgore* v. *Bruce*, 166 Mass. 136. *Way* v. *Ryther*, 165 Mass. 226. *Whiting* v. *Price*, 172 Mass. 240. *Arnold* v. *Teel*, 182 Mass. 1, 4. *Long* v. *Athol*, 196 Mass. 497, 505.

There can be no doubt that the representation that the mort-

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gages were first mortgages was a material representation of fact and not seller's talk, and the plaintiff's husband testified in effect that he relied upon it, and would not have considered the matter if he had known that the mortgages were second mortgages. The defendant contends that it could have been readily ascertained by the plaintiff and her husband, from an examination of the documents themselves and from the records, that two of the mortgages were not first mortgages, and that, if she and her husband took them as such, and have suffered damages thereby, it was due to their own carelessness and he is not liable for such damages.

So far as appears, the plaintiff had no knowledge concerning business matters of the nature of those involved in the transaction, and there was testimony tending to show that her husband was also inexperienced.* If they were inexperienced, the degree of care required of them would be, or might be found to be, different from that required of them if they possessed the requisite knowledge and skill to put them on an equal footing with the defendant. "False statements," for instance, "as to market value may not be actionable if made to an experienced dealer. . . . But it is otherwise if they are made to an unskilled person." *Kilgore* v. *Bruce*, 166 Mass. 136, 138. See also *Barndt* v. *Frederick*, 78 Wis. 1, 11; *Kendall* v. *Wilson*, 41 Vt. 567, 571. If the plaintiff's husband had little or no experience in looking up titles and did not know that the records could or should be examined to ascertain whether the mortgages were in fact first mortgages or not, we do not see how it could be ruled as matter of law that he was negligent in not examining the records himself, or in not having them examined by some one else.

Further, the plaintiff's husband testified that he spoke of going to a lawyer to have the deed made, and that the defendant said that it was not necessary, that it could be done in Worcester, and the defendant did not go to a lawyer. The jury could have found that this and the representation that the mortgages were first mortgages were calculated and were intended to divert and did divert the attention of the plaintiff and her husband from

* The plaintiff's husband testified that he had been a blacksmith for twenty years, and that, except for three years when he managed his wife's farm in Dudley, he always had been a blacksmith.

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sources of information to which they would or might have resorted but for the confidence which they were induced to place in the defendant. If that was so, then even though they might, as said in substance in *Grimes* v. *Kimball*, 3 Allen, 518, 522, 523, by searching the records in the registry of deeds, have obtained information in relation to the mortgages, they were not bound to do so, and the plaintiff is not precluded, by the fact that she and her husband did not examine the records, from recovering of the defendant the damages, if any, which she has sustained in consequence of his fraud.

Similar considerations apply to the objection that an examination of the mortgages themselves would have shown that they were not first mortgages. The defendant at no time told the plaintiff what particular mortgages he proposed to transfer. And he did nothing at the registry of deeds in Worcester, where the transaction was completed, to put the plaintiff and her husband on their guard. In delivering the notes and mortgages he put each note and mortgage into an envelope by itself and put these three envelopes into a larger one which he handed to the plaintiff's husband, and gave the assignments to the register to be recorded, with directions to mail them to the plaintiff's husband at his home in Webster. It was not until three weeks after, when the plaintiff had occasion to consult a lawyer in regard to raising some money on the mortgages, that the fraud was discovered. Very likely if the plaintiff and her husband had examined the mortgages at the registry of deeds they would have discovered the fraud, though their alleged inexperience is not to be forgotten. But they could have discovered it only by an examination of the body of the mortgage deeds themselves. There was nothing, so far as appears on the face of the papers, to show whether they were first, second or third mortgages. While the notes bore in the margin on their face statements that they were secured by mortgage on real estate, there was nothing on them to show whether they were or were not first mortgages. It was not necessary that the assignments should state whether the mortgages assigned were first mortgages or not, and presumably they did not. The plaintiff and her husband could have ascertained only by reading through the mortgage deeds whether they were first mortgages, and then they would have found the

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information which they sought only in the covenant against incumbrances. If, under such circumstances, induced by the defendant's representations and their confidence in him, they were led to refrain from an examination of the papers, we do not think that it can be held as matter of law that they were guilty of such carelessness, or that the fact that the mortgages were not first mortgages was so obvious, as to preclude the plaintiff from recovering. The case of *Arnold* v. *Teel*, 182 Mass. 1, goes farther in its facts than it is necessary to go in this case to sustain the plaintiff's exceptions. See also *Savage* v. *Stevens*, 126 Mass. 207; *Freedley* v. *French*, 154 Mass. 339; *Burns* v. *Dockray*, 156 Mass. 135; *Brady* v. *Finn*, 162 Mass. 260; *Holst* v. *Stewart*, 161 Mass. 516; *Dean* v. *Ross*, 178 Mass. 397.

Exceptions sustained.

CLARENCE E. HUBBARD *vs.* LOUIS B. ALLYN.

Hampden. October 19, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Libel and Slander. Evidence, Presumptions and burden of proof, *Res gestae.*

The answer in an action of tort for libel, brought by a baker in Westfield against a member of the board of health of that town, set up as a defense that the alleged libel was true, was published without malice and consisted of a fair comment on a matter of public interest. At the trial it appeared that the defendant caused to be published concerning the plaintiff the following: "The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance — the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless articles. Pure vanilla wholesales at about $12 a gallon. What can one expect for $2.75? He who buys at this price is either criminally stupid or deliberately dishonest. . . . The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whisky. A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character." There was no evidence that the plaintiff paid only $2.75 a gallon for the "extract in question," but he testified without contradiction that he paid $4 a gallon for it. There was adequate evidence of damage. The presiding judge refused to direct a verdict for the defendant, there was a verdict for the plaintiff and the defendant alleged an exception. *Held*, that a reasonable inference from the published article was that the defendant asserted that the plaintiff paid only $2.75 per gallon for the

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"vanilla in question," and, because he had purchased the vanilla at such price, was "either criminally stupid or deliberately dishonest"; that the jury well might have found that the plaintiff did not pay such a price for the vanilla and that consequently the article was neither a true nor a fair comment, and therefore that the exception must be overruled.

While one properly may criticise, discuss and comment in writing in a reasonable way upon acts of another which are a matter of public interest and upon the consequences likely to follow from them, and may do so with severity and by the use of ridicule, sarcasm and invective, if the basis of such criticism, discussion or comment is not fact, but falsehood, the publication is a libel.

Evidence, which is introduced at a trial without objection, and which, if it had been objected to, would have been excluded as incompetent, is entitled to its probative force.

At the trial of an action of tort for libel brought by a baker in Westfield against a member of the board of health of that town, it appeared that the alleged libel called attention to "the recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries," stated that "a dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character," insinuated that such dealer bought his "so-called vanilla" for $2.75 per gallon, and stated that "he who buys at this price is either criminally stupid or deliberately dishonest." There also was evidence tending to show that previous to the publication of the libel the board of health had made two complaints in court against the plaintiff "with regard to the conduct of things in and about his bakery," one of which was dismissed by the court in which it was made before the publication of the alleged libel, and that the complaints were a subject of newspaper discussion at the time the alleged libel was published; that the plaintiff was the only baker in Westfield upon whose premises so-called vanilla containing wood alcohol had been found, that just before the publication of the alleged libel an agent of the board of health had gone to the plaintiff's bakery and carried the keg containing the so-called vanilla across a main street of the town to the rooms of the board of health. There also was evidence that former customers of the plaintiff, in withdrawing their trade, stated that they did so because they understood that he was referred to in the article. The presiding judge refused to rule that there was no evidence that the article was published concerning the plaintiff, and the defendant excepted. *Held*, that the exception must be overruled, since there was evidence that the descriptive language of the alleged libel indicated, under the circumstances, to others than the plaintiff and the defendant, that the plaintiff was referred to in the article.

Where, at the trial of an action of tort for libel in which the defense set up in the answer is that the alleged libellous publication was true and was made without malice, there is no evidence that certain material statements in the alleged libel and inferences that might be drawn therefrom were true, the presiding judge properly may refuse to rule on the question whether there was any evidence of personal ill-will toward the plaintiff on the part of the defendant.

At the trial of an action of tort for libel brought by a baker in Westfield against a member of the board of health of that town, it appeared that the alleged libel was published by the defendant concerning the plaintiff in two local newspapers and related to the use by the plaintiff in his business of "so-called vanilla" containing wood alcohol, insinuated that the plaintiff paid $2.75 per gallon for it, stated that "he who buys at this price is either criminally stupid or deliberately dishonest. . . . A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character,"

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and characterized the use of such so-called vanilla as a "flagrant violation of public confidence and physical welfare." It also appeared that, before the board of health investigated what the plaintiff was using for vanilla, two complaints had been made by them against him in the local court, one of which the court had dismissed before the publication of the alleged libel, and the other of which afterwards was dismissed; that both complaints were then the subject of newspaper discussion; that, just before the publication of the alleged libel, an agent of the board visited the plaintiff's bakery, which was on a main thoroughfare of the town, and carried therefrom under his arm across the street to the rooms of the board a keg containing the "so-called vanilla." *Held*, that there was evidence from which a jury might have found that the defendant, in publishing the alleged libel, was actuated by such a feeling of ill-will toward the plaintiff as would render him liable for the damages resulting from the publication even if the statements therein had been true.

The fact that a single statement of fact in an alleged libel is true does not relieve the person who publishes the libel from liability to the person injured by its publication, if such true statement is so interwoven with false statements as to produce the effect of a fabrication.

The plaintiff in an action of tort brought by a baker against a member of a board of health to recover damages for the alleged publication of a libel charging the plaintiff with using in his business "so-called vanilla" containing wood alcohol, in order to prove the extent of his damages may introduce in evidence statements made by former customers in withdrawing their trade to the effect that they did so because of the statements in the libel.

TORT for a libel alleged to have been caused by the defendant to be published in two newspapers in Westfield, The Valley Echo and The Westfield Daily Times. Writ in the Superior Court for the county of Hampden dated January 1, 1907.

There was a trial before *Wait*, J., and a verdict for the plaintiff. The defendant alleged exceptions. The facts are stated in the opinion.

The case was submitted on briefs.

F. A. Ballou, for the defendant.

A. L. Green & F. F. Bennett, for the plaintiff.

RUGG, J. This is an action of libel for causing the printing in certain newspapers of an article alleged to have been false, malicious and defamatory, to have been published concerning the plaintiff and likely to injure him in his business, and to have caused him loss of patronage. The defense is that the statements were true and made without malice, and that the article consisted of fair comment on a matter of public interest.

The plaintiff is a baker. The defendant is an instructor in science in the State Normal School and a member of the board of health of Westfield. Certain samples of vanilla flavoring were

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taken from the plaintiff by an agent of the board of health of Westfield, which, on analysis by the defendant, were found to contain a dangerous amount of wood alcohol. Thereafter the defendant wrote the article complained of, which, among other statements, contained the following: "The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance — the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless articles. Pure vanilla wholesales at about $12 per gallon. What can one expect for $2.75? He who buys at this price is either criminally stupid or deliberately dishonest. . . . The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whisky. . . . A dealer as in the present case, stands absolutely without excuse for purchasing an article of this extreme character. It is the attitude of the local board of health to prosecute to the limit any such flagrant violation of public confidence and physical welfare."

The presiding judge ruled that the subject was one of public interest, and that the defendant had a legal right to publish fair and reasonable comment thereon without liability. The case comes before us on exceptions by the defendant to the refusal to give certain instructions and as to the admission of certain evidence.

1. A verdict could not have been directed for the defendant. A reasonable inference from the published article was that the writer asserted that the plaintiff paid $2.75 per gallon for the vanilla found on his premises, which contained the wood alcohol, a dangerously poisonous substance. There was no evidence whatever that the vanilla found on the plaintiff's premises cost him only $2.75 per gallon. The defendant, from his knowledge as to the cost of the several ingredients found to compose this fluid, estimated that it could be bought for that price, but made the assertion without any knowledge or information as to what the plaintiff in fact paid for it. The evidence of the plaintiff, which was uncontradicted, was that he paid $4 per gallon for it. Upon this statement as to price paid by the plaintiff, which the

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jury may have found to be false, the defendant bases the declaration that the person who had bought at that price was either "criminally stupid or deliberately dishonest"; that he was "absolutely without excuse" for his action, which was also characterized as a "flagrant violation of public confidence and physical welfare." These comments and criticisms are wholly deduced from a premise, which the jury might have found to be untrue. It cannot be said, as matter of law, that a verdict could have been ordered for the defendant, who made such a publication touching one whose business was that of furnishing food. The jury would have been warranted in finding that the substantially harmful statement contained in the article was not as to the mere presence of wood alcohol in the vanilla, but that any honest or competent person would know from the low price paid that the vanilla was of such poor quality as to be deleterious to health. Reading the whole statement, the price named was not an unimportant incident, but the pivotal fact on which hung much of the rest. If the jury found this statement of fact to be false, then they would be justified in saying further that the article was not fair comment or reasonable criticism, but an unwarranted attack, whose manifest tendency was to injure the plaintiff in his business. *Haynes* v. *Clinton Printing Co.* 169 Mass. 512. The right of the defendant was not to make false statements of fact because the subject matter was of public interest, but only to criticise, discuss and comment upon the real acts of the plaintiff and the consequences likely to follow from them, or upon any other aspect of the case in a reasonable way. This may be done with severity. Ridicule, sarcasm and invective may be employed. But the basis must be a fact, and not a falsehood. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238. *McQuire* v. *Western Morning News Co.* [1903] 2 K. B. 100. *Dow* v. *Long*, 190 Mass. 138. *Thomas* v. *Bradbury*, [1906] 2 K. B. 627.

2. It is argued that there was no evidence that the article was published concerning the plaintiff. The plaintiff's name is not mentioned in it. The subject of the article is named only as "one of our local bakeries," in which "wood alcohol in the so called vanilla" had been found, and "a dealer as in the present case." It may be conceded, as urged by the defendant,

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that knowledge of the person referred to on the part of the writer and of the plaintiff alone would not be enough to show that it was published of the plaintiff. Such descriptive language must be used as to indicate to others some particular individual under the circumstances existing in the community. It appeared that the plaintiff was the only baker in Westfield upon whose premises vanilla containing wood alcohol had been found. The agent of the board of health had visited the plaintiff's place to get the samples, and a short time before the article was printed went to his bakery and carried the keg containing the so called vanilla across a main street of the town to the rooms of the board of health. One witness, a member of the board of health, testified that he knew when he read the article that the plaintiff was referred to. The plaintiff was permitted to testify that, from conversations with customers, he knew that it was understood that he was meant by an article published in a Springfield paper, which used substantially the same descriptive language. This evidence, though perhaps not competent if objected to, nevertheless being in without objection, was entitled to its probative force. *Damon* v. *Carrol*, 163 Mass. 404. It tended to show that such language in the then state of information of the public mind in Westfield would be understood as referring to the plaintiff, and that hence the defendant's article was so understood. The testimony of Raineault, that customers gave this article as a reason for not trading with the plaintiff, the exception to the admission of which will be discussed later, also had the same tendency. If competent for any purpose, it is not rendered incompetent by the fact that it also has a tendency to influence the mind in another direction, for which alone it would not be competent. *Whipple* v. *Rich*, 180 Mass. 477. *Weston* v. *Barnicoat*, 175 Mass. 454, 456. *Commonwealth* v. *Johnson*, 199 Mass. 55. If the defendant desired to have its application restricted, he should have made such request.

It may have been found to be the reasonable inference from this testimony that a reference to the local baker, in whose shop vanilla containing wood alcohol had been found, would point inevitably to the plaintiff. Whether the article was published concerning the plaintiff is generally a question of fact. There is nothing exceptional in the present case to take it out of the gen-

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eral rule, but there was evidence enough to require submission to the jury.* *Hanson* v. *Globe Newspaper Co.* 159 Mass. 293.

The defendant has argued that the publication of advertisements by the plaintiff may have spread this knowledge. But the charge of the presiding judge is not given, and it must be assumed that ample instructions, covering this phase of the case, were given. Moreover, it is plain that the members of the board of health and its agent knew who was meant by "local dealer" as used in the article. Although they had joined in the expression of view that an article should be published, there is nothing to show that they intended to authorize the publication of a libel. The article was not shown to them in advance of being printed, nor its precise tenor communicated to them. It cannot be assumed that they intended anything more than that a fair comment upon the matter should be published.

3. The defendant requested a ruling in substance that there was no evidence of personal ill-will toward the plaintiff on the part of the defendant. This may have been refused properly on the ground that there was no sufficient evidence of the truth of the basic facts alleged respecting the plaintiff in the article. No testimony was introduced that the plaintiff paid $2.75 per

* During the course of the trial the plaintiff had testified that, after samples of what the plaintiff was using for vanilla were taken by the agent of the board of health and before the publication of the article in question, he "had some trouble" with the board of health, but was not allowed on cross-examination to state what the trouble was. The next day the presiding judge addressed the jury as follows: "Gentlemen, in consequence of the ruling which I made yesterday with regard to the admission of evidence as to the causes of trouble between the board of health and Mr. Hubbard, and of my subsequent change of view with regard to the law, we have arranged that I shall state this: That at the time or just shortly before the time of taking of the vanilla in Mr. Hubbard's bakery, there had been complaints made against him by the board of health with regard to the conduct of things in and about his bakery. One of those complaints had been dismissed by the court to which it was brought, before the publication of this article; the other was still pending, and was not disposed of till some time after the publication — quite a period after the publication, when it was also disposed of in Mr. Hubbard's favor; but the matter was being discussed in the public press at the time these articles appeared. There will be no evidence offered on those matters, but that will cover the substance of it, and those facts I have just stated you are at liberty to use in connection with any discussion of the case."

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gallon for the vanilla. Therefore the defense afforded by R. L. c. 173, § 91, could not by any possibility have been made out on the evidence as it stood. Hence actual malice on the part of the defendant was of no consequence. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 245. But, assuming that this ruling was applicable to the issues raised, no error is disclosed. There was some slight evidence tending to show actual malice by the defendant. Malice is used in this connection in the popular sense. *Connor* v. *Standard Publishing Co.* 183 Mass. 474, 480. *Fay* v. *Harrington*, 176 Mass. 270. It is not to be presumed as matter of law from the publication of the libel. *Brown* v. *Massachusetts Title Ins. Co.* 151 Mass. 127. But it does not follow that the language of the libel itself may not be found as a fact to breathe malevolence. The defendant deliberately inserted in the article the assertion of a fact concerning the plaintiff, as to the truth of which he had no knowledge, but whose truth was vital to much of the rest of the article. The agent of the board, of which the defendant was a member, sent its agent to the store of the plaintiff, which was in the centre of the business section of a large town and near the post office, between six and seven o'clock on a Wednesday evening, and caused him to carry the ten gallon keg containing vanilla under his arm across the street to the room of the board of health. This may have been found suspiciously conspicuous, both as to time and manner. After the defendant had determined to write an article for publication, he was solicited by a newspaper reporter for it. Complaints in court had been made by the board of health against the plaintiff touching the conduct of his bakery, one of which was decided before, another after, the publication of the article, both in favor of the plaintiff. Whatever may be said as to the weight of each of those circumstances standing alone, and probably the last alone would not be sufficient (*Watson* v. *Moore*, 2 Cush. 133; *Kidder* v. *Parkhurst*, 3 Allen, 393; see *Commercial Wharf Corp.* v. *Boston*, 194 Mass. 460), yet collectively they support a finding of a state of mind equivalent to actual malice.

4. The defendant asked for an instruction that "the statement in the alleged article, 'the recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries,'. . . refers

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to the quality of the vanilla, and, since it is conceded that the statement is true, the plaintiff cannot recover for any damages caused thereby." The presiding judge gave this instruction in substance, but added, "That statement you may take in connection with other statements in the entire article, in order to see whether or not you can find that there was something there stated which was untrue or unfair." This was sufficiently favorable to the defendant. A single truth may be so interwoven with falsehood as to produce the effect of a fabrication.

5. One Raineault, an employee of the plaintiff, was permitted, against the exception of the defendant, to testify as to the reasons given by customers for declining to use the plaintiff's goods. These were declarations accompanying the act of refusal to trade with the plaintiff and explaining its nature. They were competent within the rule laid down in *Elmer* v. *Fessenden*, 151 Mass. 359, 361, *Weston* v. *Barnicoat*, 175 Mass. 454, and *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223. The act, namely the refusal to buy goods, was an equivocal one; it might arise because no bakers' goods were needed at the time, or because a rival had secured the trade, or because of fear that the plaintiff's goods were poisonous, or from other considerations. A contemporaneous declaration giving the reason for the act was, therefore, competent as disclosing its real character. It was not necessary for the plaintiff to show, as a part of his case, the names of the customers. This was a proper subject for cross-examination, and it does not appear that the defendant was deprived of his rights in this respect. One claim of the plaintiff respecting damages was a loss of patronage. It was competent for the driver of his baker's wagon to state that after the publication of the articles the trade fell off, and that his customers, when refusing to trade, gave the publication of the article in question as the reason.

Exceptions overruled.

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COMMONWEALTH *vs.* WILLIAM H. BYARD.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Moving of Buildings. Malicious Injury to Trees. Tree Warden. Words, "Wantonly."

R. L. c. 52, § 13, providing that no person shall move a building in a way in a town without written permission from the selectmen or road commissioners, under R. L. c. 26, § 2, applies to cities as well as to towns.

The removal through a street of a city of a building, which is five feet longer and about a foot and a half wider than the building described in the permit granted under R. L. c. 52, § 13, is unlawful.

Under R. L. c. 51, § 10, a tree warden has no right to cut down trees or to cut off parts of trees standing on private land outside the boundary lines of a street.

At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, an instruction to the jury, stating in substance that a manifestly injurious act, done wilfully in reckless disregard of the rights of others, is done "wantonly" within the meaning of the statute, is correct.

At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, the judge instructed the jury that if the defendant, acting as a reasonable man, was justified in believing and honestly believed that he had the authority which he exercised he was not guilty, but that, if they found that, had the defendant taken any proper precaution to learn of his rights and duties as a tree warden, he would not have acted as he did, and if they found that he was grossly negligent in the performance of his duties as tree warden, they might find that he acted wantonly. *Held*, that the instruction was correct in substance.

At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, it appeared that the defendant was asked to cut off a part of a cherry tree by a person who had obtained a permit to move a building through the street, but that the building he undertook to move was longer and wider than the building described in the permit, so that its removal was not lawful, that its width was so great that it could not be taken through the street without cutting off branches and a part of the trunk of the cherry tree, that the owner of the tree refused to permit this to be done, and that the defendant, assuming to act under his authority as tree warden, did it against her protest. The defendant admitted on cross-examination that he had not at any time taken any steps to inform himself as to his powers, duties and authority as tree warden, except that he asked the mayor what he should do and was told to lop off trees in the highway which would obstruct carriages or the apparatus of the fire department, that he never had read any of the statutes or other sources of information concerning his powers and duties, except that he looked once or twice in a book sent to him by the

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State forester, that he had not seen anything in that book concerning his duties in such a case as this, that after he was asked to cut off the parts of the cherry tree he took no steps to inform himself as to his powers, duties or authority, that he did not attempt to ascertain what the permit was or whether the building was of the dimensions given in the permit, that he made no inquiry of the mayor or the city clerk, and did not consult the city solicitor, although he knew that he had a right to ask the city solicitor about it. It also appeared that he began the cutting without saying anything to the owner of the tree and that, although the evening before the cutting he saw the husband of the owner and talked with him after he had viewed the premises and had made up his mind to cut the tree, he said nothing to the husband about it. There was testimony as to the way in which the tree was cut and as to the defendant's having said that he was doing the mover of the house a favor. *Held*, that there was evidence warranting a finding that the defendant in cutting the tree acted wantonly, and justifying the jury in returning a verdict of guilty.

KNOWLTON, C. J. The defendant was found guilty upon an indictment framed under the R. L. c. 208, § 100, as amended by the St. 1902, c. 544, § 30, alleging that he "wilfully and maliciously and wantonly did injure a tree, standing for a useful purpose, of the property of Minnie M. Glendon." This was a large cherry tree standing near the line of the street, within its owner's enclosure, and it had large branches extending over the street. One part of the trunk, about fourteen inches in diameter, extended over the line of the street about nine feet above the ground. One Nickerson obtained from the proper authorities a permit to move a building through the street, around the corner, into another street. Mrs. Glendon's lot at and near the corner abutted on both streets. The building was five feet longer and about a foot and a half wider than that described in the permit, and therefore the authority given did not justify the removal of this larger building through the street. Under R. L. c. 52, § 13, which applies to cities * as well as towns, (R. L. c. 26, § 2,) its removal in that place was unlawful.

Its length and width were such that it was necessary to carry it over a part of Mrs. Glendon's land near the corner of the street, and to cut down a small tree in her yard, and Mrs. Glendon agreed with Nickerson that this might be done. Its width was so great, and houses upon the other side were so located, that it could not be taken through the street without cutting off branches and a part of the trunk of the cherry tree. The owner

* The city in this case was Fall River.

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of the tree refused to permit this to be done, and the defendant, assuming to act under his authority as a tree warden, did it against her protest.

The first question that arises is, What is the authority of a tree warden under R. L. c. 51, § 10. Does it include a right to cut down trees, or to cut off parts of trees, standing on private land outside of the boundary lines of the street? We are of opinion that it does not. The surveyors and road commissioners, under the last clause of this section, should cause parts of such trees to be removed if they obstruct the way, or endanger, hinder or incommode persons travelling thereon. In the early part of the section an exception is made of "public shade trees in towns;" but trees and bushes standing in ways may be trimmed or lopped off, or, in pursuance of a vote of the mayor and aldermen, selectmen or road commissioners, passed after public notice and a hearing, may be cut down and removed by the officer who has the care of trees belonging to a city or town. But this part of the section has reference only to trees and bushes "standing in ways." The defendant had no legal right to cut off the branches of the tree, and the ruling on this part of the case was correct.

The defendant's counsel presented seventeen requests for rulings, some of which are covered by what we have said, and many of which relate to the meaning of the word "wantonly," used in the indictment. Under this indictment it was not necessary to prove that the defendant acted maliciously. Indeed, the Commonwealth did not contend that the charge of malicious action was sustained, and the judge * instructed the jury that it was not sustained. The case was left to stand upon the allegation that the defendant acted wantonly.

The judge instructed the jury that "an act done heedlessly, without regard to the propriety demanded by the circumstances of the case, and in reckless disregard of the rights of others, with a total absence of care, amounting in this case to gross negligence by the defendant in the discharge of his duties as tree warden, would be an act done wantonly." We are of opinion that a manifestly injurious act, done wilfully, in reck-

* *Dana*, J.

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less disregard of the rights of others, is done wantonly within the meaning of this statute. *National Folding Box & Paper Co.* v. *Robertson*, 125 Fed. Rep. 524. *Werner* v. *State*, 93 Wis. 266. 30 Am. & Eng. Encyc. of Law, (2d ed.) 2, 3, 4. The jury were further instructed that if the defendant, acting as a reasonable man, was justified in believing and honestly believed that he had the authority that he exercised, he was not guilty; but if they found that if he had taken any proper precaution to learn of his rights and duties as tree warden, he would not have acted as he did, and found that he was grossly negligent in the performance of his duties as tree warden, they might find that he acted wantonly. Wilfully to do an irreparably injurious act without trying to ascertain what his rights and duties were, and to go on in gross negligence of his duties, indicated a spirit of wantonness and reckless disregard of right and wrong in his conduct affecting others. We are of opinion that the instructions on this branch of the case were substantially correct, and that the defendant's requests were rightly refused.

We are also of opinion that there was evidence to which the instructions were properly applicable, and which well warranted the finding of the jury. There were a variety of circumstances tending to sustain the contention of the Commonwealth. The defendant admitted in cross-examination that he had not at any time taken any steps to inform himself as to his powers, duties and authority as tree warden, except that he asked the mayor what he should do and was told to lop off trees in the highway which would obstruct carriages or the apparatus of the fire department; that he had never read any of the statutes or other sources of information concerning it, except that he looked once or twice in a book sent him by the State forester; that he had not seen anything in that concerning his duties in such a case as this; that he took no steps to inform himself as to his powers, duties or authority after Mr. Nickerson made complaint about this cherry tree; that he did not attempt to ascertain what the permit was, or whether the building was of the dimensions given in the permit; that he made no inquiry of the mayor or the city clerk, and did not consult the city solicitor, although he knew he had a right to ask the city solicitor about it. It also appeared that he began the cutting

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without saying anything to the owner of the tree, and that, although he saw her husband and talked with him the evening before the cutting after he had viewed the premises and made up his mind to cut the tree, he said nothing to the husband about it. There was also testimony for the consideration of the jury as to the way in which the tree was cut and as to the defendant's having said that he was doing Mr. Nickerson a favor. The bill of exceptions shows no error of law at the trial.

Exceptions overruled.

B. Cook, Jr., for the defendant.

J. M. Swift, District Attorney, for the Commonwealth.

WILLIAM H. THORNLEY *vs.* J. C. WALSH COMPANY.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Receiver. Equity Pleading and Practice, Decree, Report, Appeal, Reservation. *Equity Jurisdiction*, Receiver. *Corporation*, Foreign.

A decree in a suit in equity brought against a foreign corporation by a creditor who also has been appointed receiver of the corporation by a court of the State of its incorporation, which appoints such creditor ancillary receiver to take possession of and collect accounts owing to the corporation in this Commonwealth and attached by creditors here, should direct the ancillary receiver so appointed not to transmit the Massachusetts assets to himself as receiver in the other State until provision has been made for attaching creditors here.

The question as to whether certain evidence offered by the defendant at a hearing in a suit in equity properly was excluded by the judge is not before this court on an appeal from a decree made by the judge granting the prayer of the bill, no bill of exceptions having been filed, although, five months after the decree, the judge made a "report of facts" in which he stated that such evidence was offered and was excluded by him at the hearing.

It seems, that the question as to whether a judge, before whom was heard a suit in equity, acted properly in ruling as to the admission or exclusion of evidence, can be presented to this court only by a bill of exceptions, if exceptions to the rulings were taken at the hearing, or by a reservation under R. L. c. 159, § 29.

A bill in equity, praying for the appointment of a receiver of an insolvent corporation incorporated in another State, to be ancillary to a receiver appointed in such other State and to collect assets here and, after the rights of creditors attaching here have been safeguarded properly, to turn such assets over to the domiciliary receiver, may be maintained, although the corporation never had complied with

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St. 1903, c. 437, § 58, by appointing the commissioner of corporations to act as its attorney for receipt of service, and although the creditor petitioning here is the same person who on his own petition as a creditor was appointed domiciliary receiver and at that time was the attorney of the corporation, and made the application at the solicitation and with the consent of the corporation.

BILL IN EQUITY filed in the Superior Court for the county of Bristol on January 15, 1908, alleging that the defendant was a Rhode Island corporation and was insolvent, that, on petition by creditors of the corporation, the plaintiff had been appointed its permanent receiver by the Superior Court of Providence County, Rhode Island, that there were accounts due the defendant from persons in Fall River, "which accounts . . . have been attached by certain creditors." The prayer of the bill was that the plaintiff "or some other suitable person" be appointed ancillary receiver of the defendant.

The following "plea to the jurisdiction in abatement" was filed: "And now . . . comes Jerome C. Borden, a creditor, summoned as defendant herein, and pleads to the jurisdiction of the court and says that the petition cannot prevail for that the defendant corporation was a foreign corporation and was engaged in the business of constructing a building in this Commonwealth, and did not comply with" St. 1903, c. 437, § 58, "and because in the course of its business as aforesaid it became indebted to said Jerome C. Borden and other citizens of this Commonwealth for materials, etc. used in the construction of said building, and that the contract price of said building remains unpaid, and is held on trustee process of this court in a pending suit in which said Jerome C. Borden is plaintiff and said The J. C. Walsh Co. is defendant; that the defendant has ceased to do business in this Commonwealth, and that their action cannot be maintained, among said other reasons, because of" St. 1903, c. 437, § 60.

On January 22, 1908, *Bell*, J., overruled the plea, and appointed the plaintiff ancillary receiver, "with power and authority to collect, and receive and receipt for all assets in Massachusetts belonging to said corporation, and to pay over the same to the receiver in Rhode Island duly appointed as aforesaid, filing his account and first making report however of all his proceedings in Massachusetts to this court, and he shall be subject to such further orders and decrees of this court as shall seem meet in the premises." Borden appealed on January 27, 1908. On July

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2, 1908, the judge's "report of facts," mentioned in the opinion, was filed.

Other facts are stated in the opinion.

A. S. Phillips, for the defendant Borden.

W. H. Thornley (of Rhode Island), (*D. J. Slade* with him,) for the plaintiff.

LORING, J. This is an appeal from a final decree appointing a receiver of the property of a Rhode Island corporation in a proceeding ancillary to a similar proceeding and appointment of the same person as permanent receiver by the Superior Court of that State.

The decree should have directed the receiver here not to transmit the Massachusetts assets to himself as receiver in Rhode Island until provision had been made for attaching creditors in Massachusetts. *Second National Bank* v. *Lappe Tanning Co.* 198 Mass. 159. *Borden* v. *Enterprise Transportation Co.* 198 Mass. 590. It should be modified accordingly.

The appellant has argued a question as to the exclusion of evidence set forth in an offer of proof stated in findings of fact made by the judge who heard the petition "in accordance with the provisions of section 23 of chapter 159 of the Revised Laws." These findings of fact were made more than five months after the final decree here appealed from had been entered.

That question is not properly before us. The only way of presenting such a question to this court is by a bill of exceptions, if an exception to the exclusion of the evidence was taken at the trial, or by a reservation under R. L. c. 159, § 29.

There is nothing however in the contention of the defendant in this connection. His contention is that as matter of law a creditor of an insolvent foreign corporation cannot maintain an ancillary petition against it in the courts of this State where the foreign corporation has not complied with St. 1903, c. 437, § 58; and where the creditor who applies here applied for the appointment in the home State, was the attorney of the insolvent corporation, made the application at the solicitation and with the consent of the corporation, and was himself appointed the receiver. The appellant's argument is that since the corporation under those circumstances has no standing in the courts of the Commonwealth, (as to which see *National Fertilizer Co.* v. *Fall*

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River Bank, 196 Mass. 458; *Friedenwald Co.* v. *Warren*, 195 Mass. 432,) the attorney of the corporation who applies at its solicitation and with its consent has no greater right. If the application had been made by the plaintiff as the attorney of the insolvent corporation the conclusion urged by the appellant perhaps would have followed. But the petition here in question was made by the plaintiff as a creditor, not as the attorney of the insolvent corporation. The evidence stated in the offer of proof would have gone no farther than to raise a question as to the good faith of the proceeding, and it was so treated by the judge. He states in his finding of facts: "I ruled that the facts stated in the offers of proof were not conclusive as matter of law and determined that, if proved, I should still upon the whole case grant the petition."

The decree must be modified by providing that the receiver appointed here is not to transmit to Rhode Island the assets received here until provision is made for attaching creditors in Massachusetts. So modified the decree is affirmed.

So ordered.

LEROY L. LEWIS *vs.* WILLIAM COUPE.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Practice, Civil*, Conduct of trial. *Witness*, Cross-examination.

If the proprietor of an ice run orders a teamster who has been driving a pair of horses to change places with a man who is working on the run, and the change is made, or if without a direct order of the proprietor the change is made with the cognizance and approval of the proprietor's superintendent who has full authority to represent the proprietor in the matter, the proprietor is liable to the teamster who left his horses to work on the ice run if while so working he is injured by reason of the negligence of the proprietor in furnishing an unsafe chain as part of the machinery of the run.

A jury are not bound to believe testimony because it is uncontradicted.

If a witness on his cross-examination gives an answer which is not strictly responsive to the question, but which is germane to the subject of the inquiry and is material and competent evidence, it is within the discretion of the presiding judge to refuse to strike out the answer as non-responsive.

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TORT for personal injuries received by the plaintiff on February 1, 1904, while working on an ice run of the defendant. Writ dated May 21, 1904.

At the trial in the Superior Court before *Hardy*, J., the following facts appeared: The accident happened on the defendant's ice run in Attleborough while three or four cakes of ice were partly up the run on the way to the upper story of the ice house. The ice was being harvested at the time, and the plaintiff, with a grapple in his hand placed against the lower cake of ice, was walking up alongside the lower cake of ice, and on the outside of the run. It appeared that on each side of the run was a solid plank floor with cleats about two feet apart for the walking of men who were assisting in getting the ice from the pond up into the ice house. These walks upon either side of the ice run were about two feet wide, the distance between the cleats was twenty inches, and the length of the run was fifty-two feet. The ice run was partitioned off from the walks on either side by a board which rose a few inches above the level of the ice run floor on either side, dividing the run from the walks on either side. The flooring of the ice run was not solid, but was boarded over in such a way that there were regular open spaces between the boards. The power was furnished by two pair of horses, one on either side of the run, who were driven in a path alongside the ice house in opposite directions, each pair of horses working alternately with the other in raising the ice. The horses were fastened to a rope which went up to a pulley and block at the top of the run, and to this pulley was attached a wire cable which went down the run and was fastened by a wire to a stake chain which was attached to a grapple used to raise the cakes of ice. It was this small chain, where its links were held together by wire, that broke at the time of the accident, and the plaintiff testified that when it broke he was thrown off his balance from the walk and that his left leg went over into the ice run and the boarding fell through, and his leg went down, and before he could extricate himself the three or four cakes of ice which were on the run at the time of the accident, and which he was helping to raise to the ice house, came down on him and broke his leg. The accident happened on Monday, February 1, 1904, at about half-past one

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or two o'clock in the afternoon. The ice house was on the same road with the defendant's house and only a few feet away from the defendant's barn.

The plaintiff testified that he was a teamster in the employ of one Horace Knight, who lived in the neighborhood about half a mile away from the place of the accident; that on Sunday, January 31, 1904, one Joran came to Knight's house; that Joran wanted to know where Knight was, and he was not there, and Joran said that he wanted a pair of horses and a man to go to work at the ice house; that Knight was absent at the time; that the plaintiff hitched up the pair of horses and drove them to the ice house some time about the middle of the day, Sunday, January 31, 1904; that he did not see the defendant there at the time he arrived; that the ice was being harvested at the time he got there, and was being put into the ice house; that he hitched the horses to the rope; that he drove these horses for about two hours, and that Frank Knight, a son of Horace Knight, then was working on the right walk opposite the ice run; that one Dennet was working on the left walk opposite the ice run, and that one Monast was driving the other pair of horses, lifting the ice which Dennett was guiding up the run. Against the objection of the defendant, the plaintiff testified that Frank Knight told him that the defendant said, "if the horses wasn't going right to suit him, for to change work."

The plaintiff further testified: "Mr. Knight, Jr., told me that Mr. Coupe said if the horses wasn't going right to suit him, for to change work, and he told me that, and I did. . . . I changed for a little while that Sunday afternoon."

The plaintiff testified that, things not going right and the horses not working well, he changed off with Frank Knight and worked himself on the walk opposite the ice run for a while after that, and then resumed his work later on, driving the horses; that he did not hear the defendant give any instructions to Frank Knight, and only knew what Frank Knight told him; that Joran was all over the pond and was giving orders about the work, both in the absence of the defendant and in his presence; that the run was fifteen or sixteen feet high in the perpendicular, that the ice, at the time of the accident, was going in at the very top of the ice houses; and that at the time of

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the accident the plaintiff was about twenty-one feet up from the water.

"I was braced back this way (illustrating), to hold the ice down, and when the chain broke this handle here turned like that (illustrating) and threw me off my balance. I went over and my foot went through the run."

The following also is taken from the plaintiff's testimony: "Q. Now, Sunday, how much work did you do on the grap? How long? A. Well, not but a very little while; probably not over an hour I should n't judge. — Q. About an hour. What time of the day was that, Sunday? A. Well, I should judge in the middle of the afternoon; probably two to three o'clock. — Q. And after that you went back to the horses? A. Yes, sir. — Q. They were not behaving very well, was that it? A. The horses hadn't been doing much of anything that winter and the noise from the ice kind of scairt them. — Q. And all the morning you were driving the horses, Monday? A. Yes, sir. — Q. And how came you to go on at one o'clock, Monday? How came you to go on the run and work with the grapple? A. The horses — I thought if anybody else could use the horses better than I could, and get along any better, let them do it. As Mr. Coupe told Mr. Knight, Jr., to change around with me, I did. — Q. Who told you to go on at one o'clock, on to the run? A. Who told me to? — Q. Yes. A. Mr. Knight, Jr. — Q. And following those orders you went on the run and stayed an hour before you were hurt? A. Yes, sir. It might have been a little after one; I can't say just to the minute to the time of day it was. — Q. You didn't know that there was anything the matter with this chain before you were hurt? A. No, sir, not until afterwards. I heard afterwards that it had broke before."

Other evidence is described in the opinion.

At the conclusion of all the evidence the defendant moved to strike from the plaintiff's testimony that part of it in which the plaintiff stated that Mr. Knight, Jr., told him that the defendant said "if the horses were not going right to suit him, for to change work, and he told him that." The judge refused to strike it out.

The defendant also asked the judge to order a verdict for him on all the evidence, and to rule that the plaintiff could not

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recover. The judge refused so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $675. The defendant alleged exceptions.

F. S. Hall, for the defendant.

C. R. Cummings, (*P. E. Brady* with him,) for the plaintiff.

SHELDON, J. The defendant's contention as presented to us is that a verdict should have been ordered in his favor for the reasons, first, that the plaintiff was not employed or authorized to do the work which he was doing at the time that he was hurt, and second, because the business in which the plaintiff was employed was the business not of the defendant, but of one Angell, and that both the defendant and the plaintiff and all other men employed in the business were merely salaried employees of Angell. If either of these contentions was established, the action could not be maintained. But a verdict could not be ordered for the defendant upon either ground if there was any evidence upon which the jury could find that the defendant's contention was not made out.

1. If the plaintiff on Monday, when he was injured, in going upon the ice run and beginning to work there in hoisting up the ice from the water, did this of his own motion or at the mere request of Knight, without authority from the defendant or from the defendant's superintendent, then he was acting in excess of his duty, beyond the scope of his employment, as a mere volunteer, and cannot recover for any injury that resulted from his having undertaken work that he was not employed or expected to do. *Aziz* v. *Atlantic Cotton Mills*, 189 Mass. 156. But there was evidence that when the plaintiff first began to work for the defendant the defendant himself directed Knight to drive the horses and to put the plaintiff at work on the ice run, and that the change was made accordingly. Knight, to be sure, testified that this was to last until the horses had quieted down; but Monast and Butler gave no such limitation to the order, but stated that the defendant simply spoke of the nervousness or fright of the horses as the reason for his order. Moreover, upon the defendant's own testimony it could have been found that Joran's power of control and management of all the work and of the men engaged in it was full and complete, and there was testimony that Joran frequently saw the plaintiff at work on the

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ice run before the accident and on that occasion, and expressed no dissatisfaction. Indeed, Joran himself so testified. He added that the change, meaning, we suppose, such a change as was made between Knight and the plaintiff, was made quite often, and also that the change was perfectly satisfactory to him, and that when Knight left his position on the run and came down to drive the horses, it was perfectly proper for the plaintiff to take hold of the grapple, and that it was perfectly agreeable to him, Joran, that the plaintiff should do so. It is plain that the jury had a right to find that what the plaintiff did was done, if not in accordance with a direction given by the defendant, yet with the cognizance and approval of the defendant's superintendent, who had as to this matter full authority to represent the defendant himself. *Saures* v. *Stevens Manuf. Co.* 196 Mass. 543, 548. *Byrne* v. *Learnard*, 191 Mass. 269, 275. *Manning* v. *Excelsior Laundry Co.* 189 Mass. 231, 233.

2. The defendant's second contention rests upon his own testimony that in 1897 he had transferred to Angell all his property for the benefit of his creditors, that this assignment was still in full force and effect, that it covered all the property used in this ice business and the business itself, and that the defendant was merely in the employ of Angell upon a salary. But the jury were not bound to believe this testimony, even though it was uncontradicted. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. *Bearse* v. *Mabie*, 198 Mass. 451, 456. *Stouffer* v. *Curtis*, 198 Mass. 560, 562. And apart from this, from the defendant's own testimony upon cross-examination, it well might be found that he was in independent charge of this business, and was himself the employer of all the people who were engaged in it. In *Hanlon* v. *Thompson*, 167 Mass. 190, relied on by the defendant, the question who was the employer of the plaintiff was submitted to the jury.

3. The judge was not required to strike out the answer given by Joran that "it was a proper thing, supposed to be the thing for him [the plaintiff] to take hold of the grap." This was not strictly responsive to the question; but it was given upon cross-examination; it was germane to the subject then being inquired about; it was itself competent. It went to show the plaintiff's duties and the scope of the plaintiff's employment, and confirmed

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the evidence of the witness's approval of the plaintiff's conduct. In view of the testimony which the defendant had given as to this witness's authority and power of control, this was material evidence, and the judge was not bound to strike it out.

4. It has not been contended that there was not sufficient evidence to warrant findings that the plaintiff, though in the general employment of the elder Knight, was at the time of the accident in the service of the defendant, if the defendant was running the ice business; that the injury was due to negligence of the defendant in furnishing an unsafe chain; and that the plaintiff was himself in the exercise of due care, and had not assumed the risk of the accident by which he was injured. The exception to the refusal of the judge to strike out the plaintiff's evidence as to what the younger Knight told him about the defendant's direction to change work has not been argued, and we treat it as waived.

Exceptions overruled.

ANNIE RYAN *vs.* FALL RIVER IRON WORKS COMPANY.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Evidence*, Presumptions and burden of proof, *Res ipsa loquitur*.

At the trial of an action against a corporation operating a cotton mill by a woman who, while employed in the weaving room, received injuries alleged to have been caused by the sudden and automatic starting of a loom due to its defective condition, it appeared that the loom, which was constructed so as to be started and stopped by the use of a shipper which shifted a belt from a loose to a tight pulley, and was intended to be started in that way only, never before had started automatically, but there was evidence tending to show that it had been in use many years, that its shaft had become so worn that, some time before the accident, a new one had been substituted, and that the adjustment of the new shaft to the old loom was made in a manner which might have been foreseen by one familiar with the mechanism to make it likely that the belt would work from the loose to the tight pulley automatically and start the loom. *Held*, that there was evidence from which the jury would be warranted in finding that the cause of the automatic starting of the loom was a defect therein such as, under R. L. c. 106, § 71, cl. 1, rendered the defendant liable for the consequences of the plaintiff's injury.

A request of the defendant at the trial of an action of tort by an employee against his employer under R. L. c. 106, § 71, for a ruling that, since there was uncon-

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tradicted evidence introduced by the defendant that the injury to the plaintiff resulted from the act of a fellow servant, he could not recover, should not be given since the jury might disbelieve such testimony.

At the trial of an action against a corporation operating a cotton mill by a woman, who, while employed in the weaving room, received injuries alleged to have been caused by the sudden and automatic starting of a loom due to its defective condition, it appeared that the loom, which was constructed to be started only by means of a shipper and should have remained at rest unless so started, never before had started automatically, but there was evidence tending to show that the loom was an old one and that some repairs had been made upon it within three months before the accident, and that the repairs were made in an improper way, so as to render automatic starting likely. The presiding judge in his charge to the jury stated: "If you are not satisfied as to what was the specific cause of the starting of the loom, but do find as a fact that it did start suddenly from a position of rest when it had been properly stopped, you may consider that fact as evidence to show that there was some defective condition in the loom and some negligence in connection with that defective condition, even though you cannot state specifically what the defective condition was." *Held*, following *Byrne* v. *Boston Woven Hose Co.* 191 Mass. 40, that the instruction was proper.

TORT under R. L. c. 106, § 71, cl. 1, for personal injuries alleged to have been received by the plaintiff while in the defendant's employ. Writ in the Superior Court for the county of Bristol dated November 13, 1906.

There was a trial before *Schofield*, J., and a verdict for the plaintiff. The defendant alleged exceptions. The facts are stated in the opinion.

R. P. Borden, for the defendant.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

RUGG, J. This is an action of tort brought under the employers' liability act, for injuries occasioned to the plaintiff while an operator in the weave room of the defendant's cotton mill, and alleged to have been caused by a defect in its ways, works and machinery. The plaintiff had been at work for the defendant for about thirteen years previous to the accident. One of the machines upon which she worked was a Mason loom, which had been in use a good many years. It was started and stopped by a shipper, which moved the belt on to and from a tight and a loose pulley. The plaintiff testified, in substance, that about three months before the accident she had a lot of trouble with this loom; it required oiling more frequently than any other loom, and the pulleys were "going up and down;" it not being her duty to care for the machinery, she reported, and a loom

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fixer did something to it; the following week he took both pulleys off, and did some filing, and then replaced the pulleys, and put some pieces of tin or hoop iron in the side of the loom where the shaft runs above the box, "between the box and the side of the loom holding the box into the side of the loom"; some of these pieces came out twice and dropped on the floor, and she again called the fixer's attention to it; after these pieces fell out both the tight and loose "pulleys would keep jumping up and down" at the same time, both when the belt was on the loose pulley and when it was on the tight pulley; the pieces seemed to her to be put in to prevent the shaking of the pulleys; after the loom had been fixed, it did not run right, and the shafting used to get hot, and the fixer came to it; it had been running all right for a week before the accident. There was also evidence tending to show that the use of hoop iron for holding the box of the shaft, on which were tight and loose pulleys, into the side of the loom was not a proper appliance, and that its use for packing, although common, was not right, and the tendency of such appliances, the purpose of which was to hold the shaft true, would be to let the shaft get out of true, and that this would permit the belt to creep from the loose to the tight pulley. According to the plaintiff, the accident happened in this way: She stopped the loom for the purpose of repairing a bad place in the weaving; while doing this, with no one else near, the loom started without any apparent cause, and caught and injured her arm. The force of all this testimony was broken somewhat by the cross-examination, but the jury might still have given it full credence. There was also testimony from the loom fixer of the defendant that the repairs made consisted of replacing an old and worn out shaft with a new one. This evidence, if believed, was sufficient to bring the case within the rule established in a considerable number of decisions.

In most cases of the automatic starting of machines from a state of rest, there has been some evidence of a previous similar starting, with notice of which the defendant might have been charged. *Donahue* v. *Drown*, 154 Mass. 21. *Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407. *Martineau* v. *National Blank Book Co.* 166 Mass. 4. *Packer* v. *Thomson-Houston Electric Co.* 175 Mass. 496. *O'Neil* v. *Ginn*, 188 Mass. 346.

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Lynch v. *Stevens & Sons Co.* 187 Mass. 397. *Fountaine* v. *Wampanoag Mills*, 189 Mass. 498. But it is not necessary, in order to establish negligence of the defendant, that it should have had express notice of the precise irregularity which resulted in the injury. It is enough if such circumstances appear as to render it likely that the harmful event would not have happened except for some act or omission amounting to a want of ordinary precaution. The mere starting of a machine, without the intervention of any human agency and when it should have remained at rest, is of itself evidence of some defective condition. To this extent the doctrine of *res ipsa loquitur* has been established. *Gregory* v. *American Thread Co.* 187 Mass. 239, 242. See *Coleman* v. *Mechanics' Iron Foundry Co.* 168 Mass. 254; *White* v. *Boston & Albany Railroad*, 144 Mass. 404. Here the machine had been in use many years, and the shaft had become so worn that it was necessary to substitute a new one, and there was some slight evidence that the adjustment of the new shaft to the old loom was made in such a manner that it might have been foreseen by one familiar with the mechanism, that the belt was liable to work from the loose to the tight pulley. These circumstances, in connection with the fact of the starting of the machine, constituted not only evidence of a defective condition of the machine, but also that the defendant, in the exercise of due precaution, might have discovered the defect. *Gregory* v. *American Thread Co.* 187 Mass. 239. *Connors* v. *Durite Manuf. Co.* 156 Mass. 163. The defendant's first, fourth, sixth and eighth requests for instructions were therefore properly refused.*

Its ninth request, to the effect that, there being uncontradicted evidence that the loom was started by the act of a fellow servant, the plaintiff could not recover, was rightly refused, for the reason that the jury may have disbelieved this testimony, even though uncontradicted. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

The defendant has strongly argued that there was error in that portion of the charge by which the jury were told, "If you are not satisfied as to what was the specific cause of the starting of the loom, but do find as a fact that it did start suddenly from

* These were in substance requests that on all the evidence the plaintiff could not recover.

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a position of rest when it had been properly stopped, you may consider that fact as evidence to show that there was some defective condition in the loom and some negligence in connection with that defective condition, even though you cannot state specifically what the defective condition was." This statement and various amplifications of it used by the trial judge follow almost exactly the language which was held to be correct as applicable to similar facts in *Byrne* v. *Boston Woven Hose & Rubber Co.* 191 Mass. 40. In that case, as in this, the machine had never before started of its own motion, but there it had broken down two weeks before and had been repaired, while here a part had been worn out and had been replaced by a new one, which had not in all respects worked well. It has been urged that the jury might have found on the evidence that the loom had been put in good condition by the repairs made upon it, and that if this was so, then mere automatic starting is not evidence of negligence. The occurrence of an accident, standing alone, is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then a verdict should be directed against the plaintiff. The law knows no general rule of absolute insurance against injury. *Kenneson* v. *West End Street Railway*, 168 Mass. 1, *Saxe* v. *Walworth Manuf. Co.* 191 Mass. 338, *Hill* v. *Iver Johnson Sporting Goods Co.* 188 Mass. 75, *Flynn* v. *Beebe*, 98 Mass. 575, *Curtin* v. *Boston Elevated Railway*, 194 Mass. 260, *Thompson* v. *National Fireworks Co.* 195 Mass. 327, *Hofnauer* v. *R. H. White Co.* 186 Mass. 47, *Childs* v. *American Express Co.* 197 Mass. 337, are illustrations of this doctrine. But the unexplained automatic starting of a machine, when it ought to remain at rest, stands upon a different basis. It is a personal duty of the employer to furnish and maintain for employees for use in their work reasonably safe and proper machinery and appliances, so far as the exercise of proper care will secure them. This duty arises out of the relation of master and servant and cannot be delegated. It is a continuing obligation and may require frequent and efficient inspection and repair. It involves exclusive control, so far as

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necessary for the performance of the duty. Under these circumstances the court would not be justified in saying that the jury might not find, as men of experience in common affairs of life, that such a machine does not ordinarily start automatically without some negligence of omission or commission on the part of the employer, and that the existence of such negligence is the rational explanation of the starting. This was the decision in *Byrne* v. *Boston Woven Hose & Rubber Co.* 191 Mass. 40, and is supported by the principle elaborated in other authorities in addition to those heretofore cited. *Copithorne* v. *Hardy*, 173 Mass. 400. *Cahill* v. *New England Telephone & Telegraph Co.* 193 Mass. 415. *Moynihan* v. *Hills Co.* 146 Mass. 586, 591. *Toy* v. *United States Cartridge Co.* 159 Mass. 313. *Graham* v. *Badger*, 164 Mass. 42. *Minihan* v. *Boston Elevated Railway*, 197 Mass. 367. *Flaherty* v. *Norwood Engineering Co.* 172 Mass. 134. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143. *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295. *Mulvaney* v. *Peck*, 196 Mass. 95. There is nothing in *Ross* v. *Pearson Cordage Co.* 164 Mass. 257, in conflict with these conclusions. The plaintiff in that case did not rest upon the liability which might spring *prima facie* from the automatic starting of the drawing frame, but, having shown by her own expert that there was no defect in the machine, sought to fasten responsibility for her injury upon the employer on the ground that the shipper, by which power was communicated to and disconnected from the machine, should have been fitted with some device for securing it in position, although it was in the same condition as at the time the contract for service began, and of a type in common use. The decision was placed upon the ground that the mere absence of these contrivances under such circumstances was not enough to charge the defendant. In this as well as in the other respects pointed out in *Mulvaney* v. *Peck*, 196 Mass. 95, *Ross* v. *Pearson Cordage Co.* is distinguishable from the case at bar.

The defendant objected that, in the question to the plaintiff's expert, facts were assumed which were not in evidence, and excepted to the refusal of the presiding judge to exclude the question on this ground. The judge correctly ruled that the jury must find that there was sufficient evidence to support a finding of the facts assumed in the question before they could give any

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weight to the answer. The facts assumed in the question were the holding of the box, through which ran the shaft carrying the fast and loose pulleys, into the side of the loom with pieces of hoop iron. The plaintiff testified that the pieces of hoop iron were holding the box into the side of the loom. Upon this state of evidence the question to the expert could not have been excluded.

Exceptions overruled.

HELEN M. HALL *vs.* BENJAMIN HALL.

Bristol. October 26, 1908. —November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Superior Court. Jurisdiction. Practice, Civil, Appeal, Amendment.

The Superior Court has no power, after a civil action has been entered therein on appeal from a district court, the jurisdiction in which does not extend to actions where the *ad damnum* exceeds $1,000, to allow an amendment to the writ increasing the *ad damnum* from $1,000 to $2,000.

It seems, that, on an appeal of a civil action from a police, district or municipal court or trial justice to the Superior Court, the case in the appellate court is a mere continuation of the original case and, although amendments may be allowed in the latter court under R. L. c. 173, §§ 23, 97, they must be such, so far at least as they affect the question of jurisdiction, as could have been made in the court whose judgment is appealed from.

CONTRACT for money had and received. Writ in the Second District Court of Bristol dated August 4, 1905.

On appeal to the Superior Court, a motion was therein filed and allowed by *Bell*, J., increasing the *ad damnum* of the writ from $1,000 to $2,000, and the defendant appealed. Other facts are stated in the opinion.

D. F. Slade, for the defendant, was not called upon.

F. A. Pease, for the plaintiff.

MORTON, J. This action was brought in the Second District Court of Bristol, the jurisdiction of which is limited to $1,000. The *ad damnum* of the writ originally was $500 and the declaration, which was for money had and received, alleged that the defendant owed the plaintiff $400. Subsequently the plaintiff was allowed in that court to amend her writ by making the *ad damnum*

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$1,000 instead of $500 and to amend her declaration by substituting $1,000 for $400. Judgment was rendered in the District Court in favor of the plaintiff for the sum of $379.60 and costs of suit, and the defendant appealed therefrom. In the Superior Court the case was sent to an auditor who found in favor of the plaintiff in the sum of $1,032.13 and interest from August 4, 1905, the date of the writ. Before the auditor's report was filed the plaintiff moved in the Superior Court to increase the *ad damnum* from $1,000 to $2,000. This motion was allowed and the defendant appealed from the allowance of it. The case was subsequently heard by a judge without a jury, and he found in favor of the plaintiff and assessed the damages in the sum of $1,209.66.

The sole question is whether the Superior Court had power to allow the amendment increasing the *ad damnum* from $1,000 to $2,000. We do not think that it had. The jurisdiction of the Superior Court was wholly appellate and it could only try such issues and render such judgment as the court appealed from could have tried and rendered. *Kelley* v. *Taylor*, 17 Pick. 218, 221. It is clear that if the *ad damnum* of the writ as entered in the District Court had been $2,000 the case would have been beyond the jurisdiction of that court. *Ashuelot Bank* v. *Pearson*, 14 Gray, 521. *Ladd* v. *Kimball*, 12 Gray, 139. That court could no doubt have allowed an amendment reducing the *ad damnum* so as to bring the case within its jurisdiction, but in the absence of such an amendment any judgment rendered by it would have been void. *Hart* v. *Waitt*, 3 Allen, 532. The case in the appellate court is a mere continuation of the original case, and though amendments may be allowed in the appellate court, R. L. c. 173, § 23, *Fels* v. *Raymond*, 134 Mass. 376, the amendments must be such, so far at least as they affect the question of jurisdiction, as could have been made in the court whose judgment is appealed from. See, as supporting the general doctrine that an appeal is merely a continuation of the original case, *Union Pacific Railway* v. *Ogilvy*, 18 Neb. 638; *Bickett* v. *Garner*, 21 Ohio St. 659.

The plaintiff contends that the Superior Court had power to allow the amendment under R. L. c. 173, § 97, which provides, with certain exceptions not now material, that, after an appeal

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from "the judgment of a police, district or municipal court or trial justice in a civil action" has been entered in the Superior Court the case "shall be there tried and determined as if it had been originally commenced there." But the object of this provision is simply to enable parties to have their rights determined in the appellate court without regard to any judgment or determination that may have been rendered in the court below. *Lew* v. *Lowell*, 6 Allen, 25, 27. *Ball* v. *Burke*, 11 Cush. 80, 82. The right of appeal is wholly a statutory right, and, without some such provision as that referred to, parties would be confined to the issues and evidence presented in the court below. That this is the true construction of the statute is also shown, we think, by its history. See Prov. St. 1697, c. 8, §§ 1, 2, 1 Prov. Laws, (State ed.) 282; St. 1783, c. 42, § 6; St. 1825, c. 89, § 2; Rev. Sts. c. 85, § 13; c. 87, § 36; Gen. Sts. c. 120, § 25; c. 116, § 32; Pub. Sts. c. 155, § 28; c. 154, § 39; St. 1893, c. 396, § 24; R. L. c. 173, § 97.

The construction contended for by the plaintiff would require us to import into the statutes an exception in appealed cases to the limit of the jurisdiction of the court appealed from, notwithstanding no such exception has ever been incorporated into any of the statutes relating to appeals from justices of the peace, trial justices or from police, district, or municipal courts. This, though not conclusive, furnishes a strong argument against the soundness of the construction contended for.

The plaintiff relies upon cases from New York and Wisconsin. *Jackson* v. *Covert*, 5 Wend. 139. *Palmer* v. *Wylie*, 19 Johns. 276. *Dressler* v. *Davis*, 12 Wis. 58. *Hare* v. *Marsh*, 61 Wis. 435. The statute in New York differs somewhat from our own statute, and the highest court in Wisconsin was of opinion that their own statute so closely resembled that of New York as to warrant them in following the decisions of the courts of that State. It is perhaps a matter on which courts of last resort might differ, but we think that the construction which we have given to our own statute is the correct one.

Judgment reversed; order allowing motion set aside.

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MARY BONVILLE, administratrix, *vs.* JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, & SHELDON, JJ.

Insurance, Life.

The requirement of R. L. c. 118, § 73, that every policy of life insurance which contains a reference to the application of the insured must have attached to it a correct copy of the application, is complied with by attaching to the policy a copy of the application for insurance without including a copy of a proposal for insurance printed and written on the back of the same paper or a "Memorandum for the solicitor to fill" printed above the application for insurance on the same side of the paper consisting of the questions "Amount of insurance now in force in this company?" and "Amount now applied for?"

CONTRACT on a policy of life insurance for $250 issued by the defendant on October 11, 1905, upon the life of Adella Ryan of Fall River, the plaintiff's intestate, who died on April 17, 1906. Writ dated July 24, 1906.

At the trial in the Superior Court before *Bell*, J., the only defense relied upon was that the insured had made misrepresentations with actual intent to deceive, or with reference to matters which increased the risk of loss, in answering certain questions in the application for insurance. The defendant offered in evidence the application for the policy, and the plaintiff objected to its admission on the ground that a correct copy of the application was not attached to the policy. The papers are described in the opinion.

Upon inspection of the papers the judge ruled *pro forma* that a correct copy of the application was not annexed to the policy, and that the application offered was not admissible. He directed a verdict for the plaintiff, and the defendant excepted to this ruling. At the request of the parties, the judge reported the case with the agreement, made before his ruling, that, if the application should have been admitted, judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiff on the verdict.

C. R. Cummings, (*J. W. Cummings* with him,) for the plaintiff.

D. F. Slade, for the defendant.

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KNOWLTON, C. J. This case comes to us on a report, by the terms of which judgment is to be entered for the defendant if a correct copy of the application for the policy was annexed to the policy, so as to make the application admissible in evidence under the R. L. c. 118, § 73, and judgment is to be entered for the plaintiff if the application was inadmissible.

The defendant's method of doing business was to furnish its agents for use by an applicant a sheet of paper printed in blank on both sides, on the first page of which was a "Proposal for special weekly premium insurance in the John Hancock Mutual Life Insurance Company," followed by a certificate of the agent on the same page. The first of these blanks was to be filled and signed by the person seeking insurance. Enclosed in heavy black lines in this was a "Memorandum to be filled only at the home office." Upon the second page, on the opposite side of the same sheet, were the words "Memorandum for the solicitor to fill," followed by two questions, one asking the "Amount of insurance now in force in this Company?" and the other the "Amount now applied for?" Under these were the words "Application for insurance in the John Hancock Mutual Life Insurance Company," followed by questions as to health and other matters affecting the risk, to be answered over the signature of the applicant, together with a declaration and warranty as to the representations and answers. Accompanying this, on the same page, was a certificate to be signed by an examining physician, as to having asked the foregoing questions, and as to the answers having been given as recorded, together with a blank for a separate medical examination by question and answer, to be signed by the examining physician. A copy of all the second page below the two questions in the memorandum for the solicitor to fill, beginning with the words "Application for Insurance," was annexed to the policy on which the action was brought; but the first page of the sheet and these two questions on the second page were not copied.

The plaintiff contends that the first page is a part of the application, and should have been copied and annexed to the policy in order to entitle the defendant to put the application in evidence. This contention is answered by the decision in *Langdeau* v. *John Hancock Ins. Co.* 194 Mass. 56, a suit against this

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same defendant, in which the proposal for insurance and the application were in substance the same in form as in the papers now before us. The slight differences in language in two or three parts of the papers are entirely immaterial upon the question to be decided. It is plain that the defendant company saw fit, for convenience, to have a proposal made for a contract of insurance, stating matters, most of which would be embodied in the policy if the proposal should be accepted, and then to have a separate application, giving information upon matters affecting the risk, upon which the company might rely as a part of the contract between the parties. In the case just cited it was decided that this proposal for insurance was not the application nor a part of the application within the meaning of the statute, and the same decision must be made in the present case.

We are of opinion that the memorandum for the solicitor to fill, containing two questions at the top of the second page, was no part of the application. The heading of the application is just below this memorandum.

In the application one answer, in reference to the applicant's weight is, "Gained, 7 pounds." In the copy of this, upon the back of the policy, the figure stating the number of pounds was obviously changed after it was first written, and the plaintiff contends that it is a 9, while the defendant contends that it is a 7. We are of opinion that it should be read as a 7 and that the copy is not incorrect in this particular. We do not understand that the presiding judge made any finding of fact on this subject, but that he only ruled *pro forma*, as matter of law, that a correct copy of the application was not annexed to the policy. This may have been on the ground that the first page of the sheet was a part of the application, or on the ground that the two questions and answers on the top of the second page were a part of the application, or for some other reason.

There was no material error in copying this part of the application.

Judgment for the defendant.

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EDWARD DOOLAN *vs.* POCASSET MANUFACTURING COMPANY.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Elevator*. *Pleading, Civil*, Declaration.

At the trial of an action by an employee against his employer, to recover for personal injuries alleged to have been received by reason of the plaintiff's being crushed against a post in the defendant's mill in Fall River by the sudden opening of doors in a floor to permit a freight elevator to come up, there was evidence tending to show that the plaintiff was in the exercise of due care and that he had not assumed the risk of the injury, and that the elevator was not equipped, as required by R. L. c. 104, § 27, with "a suitable device which shall act as a danger signal to warn people" of its approach, although no inspector, as provided by the statute, had approved of the use of the elevator without the device, and the nature of the business was not such that the necessity for the device would not warrant the expense. The presiding judge directed a verdict for the defendant. *Held*, that the case should have been submitted to the jury.

At the trial of an action by an employee against his employer, to recover for personal injuries alleged to have been received by reason of the plaintiff's being crushed against a post in the defendant's mill by the sudden opening of doors in a floor to permit a freight elevator to come up, there was evidence tending to show that there were no signals to warn people of the elevator's approach, that the plaintiff when injured was fifteen years of age and was mentally deficient, that he never had been warned of the danger attending the use of the elevator through the floor, that when injured he had been at work for the defendant but two days and, just before the accident, had been told to clean the elevator doors in the floor and was doing so when injured, and that his attention had not been called to the absence of warning signals. It did not appear that the absence of the warning signals could have been discovered by mere ocular inspection or in any other way than by observing that the only warning given was by the movement of the elevator ropes which came up through the floor or by the opening of the doors. *Held*, that there was evidence warranting a finding that the plaintiff was in the exercise of due care; *also*, that he had not assumed the risk of the injury as matter of law.

In an action by an employee against his employer to recover for injuries due to a dangerous or defective condition of the surroundings in which or the machinery with which the plaintiff was directed to work, it is not necessary for the plaintiff, in order to rely upon the fact that he was mentally deficient, to allege such deficiency in his declaration.

TORT for personal injuries alleged to have been received by the plaintiff while in the defendant's employ and to have been caused by the sudden opening for the passage of a freight elevator of doors in the floor of the room where the plaintiff worked in the defendant's mill in Fall River, the plaintiff being thereby

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caught between one of the doors and a post. Writ in the Superior Court for the county of Bristol dated November 11, 1906.

There was a trial before *White*, J. There was evidence tending to show that the plaintiff when injured was fifteen years of age, that he had gone to school from the time he was five until he was fourteen years of age, and that, when he left school at the latter age, he had progressed only to the second or primary grade, and that he was deficient in intelligence at the time of the trial, being unable to recognize the words "all" or "mouse" when they were spelled to him. Other facts are stated in the opinion.

At the close of the evidence, the presiding judge directed a verdict for the defendant and reported the case for the consideration of this court, it being agreed that, if the ruling directing the verdict was right, the verdict was to stand, and, if the ruling was wrong, judgment was to be entered for the plaintiff for $500 and interest from the date of the trial.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

R. P. Borden for the defendant.

SHELDON, J. It is provided by R. L. c. 104, § 27, among other things, that "elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator," but that upon the approval of the building commissioner in Boston or of the "inspector of buildings, or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense." There was evidence that the freight elevator by whose operation the plaintiff was injured was not so equipped; and it might have been found that there had been no approval of its use by any of the officers mentioned in the statute, and that the nature of the business was not such that the necessity for danger signals did not warrant this expense. The jury might also have found that the plaintiff's injury was due to the defendant's negligence in not having installed such danger signals. If so, they would have had a right to find a verdict for the plaintiff, unless he had either assumed the risk of what happened or had been guilty of some

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lack of due care which contributed to the injury. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580. *Baldwin* v. *American Writing Paper Co.* 196 Mass. 402, 409. *McCarthy* v. *Morse*, 197 Mass. 332, 336, 337.

Even if the servants of the defendant ordinarily would by entering its service assume the risks arising from its failure to comply with the requirements of the statute, yet we cannot say that this plaintiff, in view of his age and what the jury might have found to be his mental capacity, had assumed the risk of what happened to him. He had been at work for the defendant only two days. He had been told to clean around these elevator doors. His attention had not been called to the absence of danger signals to give warning of the approach of the elevator; and it cannot be said, as matter of law, from his confused and contradictory evidence, that he was aware of such absence. He had a right to suppose that the defendant was operating its elevator in the manner required by law; and a single instance of the approach of the elevator without his hearing a signal might be accounted for by a temporary failure of the apparatus to work as designed, or by his own failure to hear, due either to inattention or to absorption in his work. It does not appear that the absence of the required signals could have been discovered by mere ocular inspection, or in any other way than by observing that warning never was given otherwise than by the movement of the elevator ropes or by the opening up of the doors in the floor through which the elevator passed. But if this were so, the risk from the absence of signals would not necessarily and as matter of law be assumed by reason merely of entering into the defendant's employ, or until the servant had learned that no such signals were in use. The reasoning of the court in *Patnode* v. *Warren Cotton Mills*, 157 Mass. 283, 287, and *Hodde* v. *Attleboro Manuf. Co.* 193 Mass. 237, 238, would be applicable. And for the same reasons the question of the plaintiff's due care was also for the jury.

The circumstances of this case are very different from those of *Connors* v. *Merchants Manuf. Co.* 184 Mass. 66, relied on by the defendant. The plaintiff in that case was a woman of full age and of sufficient capacity. She was acquainted with all the surrounding conditions. She was injured because she chose

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without necessity to walk over a trap door simply to save time. She had no reason to suppose that any warning device had been put upon that elevator; the statute was not in force when she began her work, and she had no right to presume that the defendant was then complying with what would become its obligation only in the future; and in her six weeks' employment she had learned that there was nothing but the movement of the ropes to indicate that the elevator was in motion. The rule of that case is not applicable here. The same thing may be said of *Silvia* v. *Sagamore Manuf. Co.* 177 Mass. 476, 479.

Upon the evidence of the plaintiff and of his former teacher Miss McCann, it might have been found that the plaintiff was not of ordinary capacity, and that this fact ought to have been obvious to the defendant. It may be that the jury would have thought it easier to account for the character of the plaintiff's own testimony by saying that he was dishonest and was endeavoring to counterfeit stupidity than by finding that he was really lacking in mental ability; but this was a question for them. They might say that his persistent failure to answer pertinent questions proceeded from some lack of ordinary capacity, some failure of comprehension, or some defect in the communication between the brain centres and the organs of speech, and not from a consciousness that proper answers would show the falsity of his pretenses. They might say that the answers which were finally elicited from him, so far as these were damaging to his case, were rather the wearied acquiescence of an unintelligent mind in the propositions put before it than the deliberate enunciation of understood facts. If they found that he was manifestly deficient in mental capacity, then the case would be governed by the doctrine of *Ciriack* v. *Merchants' Woolen Co.* 151 Mass. 152.

Nor can we accede to the defendant's contention that evidence to show the plaintiff's mental deficiency could not be admitted unless that deficiency had been averred in the declaration. No authority is cited for this claim; nor are we aware of any decision that could be so cited. The real issues in these cases are as to the defendant's negligence, and the plaintiff's due care and assumption of risk. The plaintiff's mental capacity is merely a circumstance which may bear upon these issues. It is not one

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of the substantive facts which are necessary to constitute the cause of action within the meaning of R. L. c. 173, § 6, cl. 2.

Accordingly, the action should have been submitted to the jury; and under the terms of the report judgment must be entered for the plaintiff in accordance with the stipulation of the parties.

So ordered.

HELEN D. HOWLAND, executrix, *vs.* WILLIAM C. PARKER & another, trustees, BARKER C. HOWLAND, claimant.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Power. Devise and Legacy.

A husband and wife executed with a trustee an agreement in writing whereby they agreed to live apart and the trustee received $5,500 "to be deposited in . . . banking institutions," from which and its income he was to pay to the wife $250 semiannually. The agreement also provided that, on the death of the wife, the trust should terminate and the fund be paid "to such persons or be disposed of in such manner as" the wife "shall by her last will direct," but that, "in the event of" the wife "dying intestate," the fund should be paid to the husband. The wife afterward died leaving a will which contained, besides a specific devise and various specific bequests of personal belongings which had been given to her by the legatees, a clause, the seventh, directing that, after the payment of the debts of the testatrix, the expenses of her funeral and of the administration of her estate, and the delivery of the specific bequests, "the remainder of the money securities or deposits belonging to my estate" should be held in trust for a certain cousin, and that, upon the decease of that cousin, the trust for her benefit should terminate and "said trust estate shall then revert to my general estate and be paid to . . . [C.] . . . as hereinafter provided." The eighth clause of the will provided that "all articles of personal property belonging to me at my decease, which are not herein specifically bequeathed or designated to be held in trust, . . . I give devise and bequeath to . . . [C.]." Upon the husband's claiming the fund in the hands of the trustee under the agreement of separation, the latter refused to deliver it to the executor of the will of the wife, and the executor brought an action of contract to recover it. The husband was summoned in to defend against such action as claimant. *Held*, without deciding whether or not the power given to the wife by the terms of separation agreement was executed by the seventh clause of her will, that, if it was not executed by the seventh clause, it was by the eighth, which was a residuary clause, and therefore that the fund should be paid to the executor of the wife's will.

Where a testator has the income of a fund for life, with a power of disposing of the principal by will, a residuary bequest in his will should be construed to be an execution of that power, unless the will shows that such clause was not intended so to operate.

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CONTRACT by the executrix of the will of Mary E. Howland, to recover money alleged to be in the possession of the defendants as trustees under a written instrument by the terms of which, on the death of the plaintiff's testate, the fund was to be disposed of as by her last will she should direct. Writ in the Superior Court for the county of Bristol dated December 16 1907.

The answer acknowledged possession of the money as alleged, but stated that one Barker C. Howland claimed it. The latter was summoned to appear under R. L. c. 173, § 37, and did appear and filed an answer as claimant.

There was a trial before *Raymond*, J., without a jury, upon an agreed statement of facts. It appeared that Barker C. Howland was the husband of the plaintiff's testate. On April 4, 1905, he and the plaintiff's testate and the defendants executed an instrument by the terms of which he and the plaintiff's testate agreed to live apart, and he paid to the defendants $6,000, of which $500 was to be received by them as entire payment for their services, and $5,500 was "to be deposited in one or more banking institutions" and from the income and principal of such fund $250 was to be paid to the plaintiff's testate semiannually. The instrument also provided as follows:

"That in the event of the death of said Mary E. Howland while these trusts remain in force, thereupon said trusts shall terminate and all said funds then held in trust shall be paid by said trustees to such persons, or disposed of in such manner, as the said Mary E. Howland shall by her last will direct. In the event of the said Mary E. Howland dying intestate the said fund shall then be paid to said Barker C. Howland."

On April 14, 1905, the will of the plaintiff's testate was executed. It contained the following clauses:

"Seventh — After the payment of my just debts, expenses of funeral, cremation and burial and the administration of my estate and the delivery of the specific bequests hereinbefore given, the remainder of the money securities or deposits belonging to my estate, I ask shall be held in trust by my said Executrix during the lifetime of my cousin, Susan A. Gilbert, and during the continuance of said trust the net income received

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therefrom shall, from time to time, and at least semi-annually, be paid to my said cousin for her own personal use and free from all interference or control of her husband.

"Upon the decease of my said cousin, Susan A. Gilbert, said trust shall terminate, and said trust estate shall then revert to my general estate and be paid to my said sister, Jessie E. Corson, as hereinafter provided.

"Eighth — All articles of personal property belonging to me at my decease, which are not herein specifically bequeathed or designated to be held in trust, and all right, title and interest, if any, which I may have in any real estate at my decease, I give, devise and bequeath to my said sister, Jessie E. Corson, and upon the termination of said trust, the net amount then remaining of said trust estate shall also be delivered and paid to my said sister, who shall receive, hold, enjoy and dispose of the same as her own individual property, free from the control and interference of her husband, and shall hold the same to her and her heirs and assigns forever."

The first clause of the will gave directions with regard to the funeral of the testatrix. The second, fourth and sixth clauses gave back to the persons who had given them to the testatrix "the various articles which" she had received from them "as gifts." Also in the sixth clause was included a specific legacy of a diamond ring. The third clause was a specific devise of a burial lot. The fifth clause gave to Susan A. Gilbert "as specific legacies, such articles of personal property belonging to me, not including money or articles of jewelry which may be upon the premises wherein she lives at my decease, and also my wearing apparel but not including articles of jewelry, wherever such apparel may be at my decease."

Other facts are stated in the opinion.

E. J. Hadley, for the plaintiff.

W. B. Perry, (*G. H. Potter* with him,) for the claimant.

LORING, J. The first contention made by the executrix is that the seventh clause of the will of Mrs. Howland was a valid execution of the power, and her second, that the eighth clause is a valid execution of it if the seventh is not.

In this action it is not necessary to decide between the two. If either clause operates as an execution of the power, the fund

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goes to the executrix under the rule established in *Olney* v. *Balch*, 154 Mass. 318.

We are of opinion that the fund passes under the eighth clause if it does not pass under the seventh.

It is settled in this Commonwealth that where a testator has the income of property for life with a power of disposing of the principal by deed or by will, or by will alone, a residuary bequest or devise by him of his personal or of his real property is to be construed to be an execution of that power. *Amory* v. *Meredith*, 7 Allen, 397. *Willard* v. *Ware*, 10 Allen, 263. *Bangs* v. *Smith*, 98 Mass. 270. *Sewall* v. *Wilmer*, 132 Mass. 131. *Cumston* v. *Bartlett*, 149 Mass. 243. *Hassam* v. *Hazen*, 156 Mass. 93. *Stone* v. *Forbes*, 189 Mass. 163. *Tudor* v. *Vail*, 195 Mass. 18. "The reason which has led to the establishment of the general rule which now prevails in England (St. 7 Will. IV. & 1 Vict. c. 26, § 27), as well as here, [is] that where one has the use and income of land during life with a power of disposition after death, it is natural for him to consider and treat it as his own property." C. Allen, J. in *Cumston* v. *Bartlett*, 149 Mass. 243, 250. Not only that, but it is not unnatural for him to speak of it as his own property in making his will.

In the case at bar $250 a year was to be paid to Mrs. Howland from the principal of the trust fund and the interest thereon.

The contention of the claimant is that the eighth clause of the will is not a bequest of the residue of the personal property not otherwise disposed of so as to include personal property, if any, described in the seventh clause which does not pass under that clause of the will. His argument is that the eighth clause covers "all articles of personal property belonging to me at the time of my decease not designated to be held in trust" by the seventh clause, and since money, securities and deposits are designated to be held in trust by the seventh clause they are as matter of description excluded from the eighth clause. The bequest made in the eighth clause is "all articles of personal property belonging to me at my decease, which are not herein specifically bequeathed or designated to be held in trust and all right, title and interest, if any, which I may have in any real estate at my decease I give," etc. We are of opinion that the words "designated to be held in trust" must be construed to mean given in

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trust, and not to mean that money, securities and deposits are excluded as matter of description in all cases from the personal property covered by the eighth clause. The eighth clause therefore includes all personal property which does not pass under the previous provisions of the will. The devise contained in this article is confessedly a general residuary devise. It is evident that the bequest there made was intended to be equally extensive.

As to the contention of the executrix that the fund passed under the seventh clause of the will: The description of the personal property covered by that clause of the will indicates that the testator had this trust fund in mind. By the terms of the indenture creating the trust fund of $5,500, it was to be paid in money and deposited in bank, and by the agreement of the parties a promissory note had been substituted therefor. Further, if it had appeared that Mrs. Howland had no money, securities or deposits on April 14, 1905, when she executed her will, that fact would warrant holding the seventh clause to be an execution of the power. See the third class of cases mentioned by Story, J., in *Blagge* v. *Miles*, 1 Story, 426, referred to in *Amory* v. *Meredith*, 7 Allen, 397, 398. See also *Wallop* v. *Lord Portsmouth*, Appendix to Sugden on Powers, (8th Eng. ed.) 916; *Hurst* v. *Winchelsea*, 2 Kenyon, 444; *S. C.* 2 Burr. 879, and 1 Bl. 187; *Standen* v. *Standen*, 2 Ves. Jr. 589; *Grant* v. *Lynam*, 4 Russ. 292. The statement in the agreed facts that "Without the proceeds of said trust fund, the estate of the said Mary E. Howland is insufficient to pay her debts, funeral expenses and charges of administration," is not tantamount to a statement that the testatrix had no money, securities or deposits of her own to which the seventh clause could apply.

The question whether the fund passed under the seventh or eighth clause is a question which should be decided in a suit in which the legatees named in those two clauses are parties. Upon that question we express no opinion now. As we have said, the executrix is entitled to the fund, whichever way that question is answered.

The entry must be

Judgment reversed; judgment to be entered for the plaintiff.

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EDMUND WOOD *vs.* WALTER B. FARMER.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Construction, Assignment, Validity. *Practice, Civil*, Parties, Demurrer. *Evidence*, Extrinsic affecting writings. *Assignment*. *Statute of Frauds*. *Wagering Contracts*. *Words*, "*Pro rata*," "Jointly."

A contract in writing was made between an individual as the party of the first part, a corporation as the party of the second part, and seven "other persons . . . designated as the guarantors, parties of the third part." The contract provided, among other things, for the payment of $25,000 by the corporation to the party of the first part. The undertaking of the guarantors was stated as follows: "The guarantors jointly guaranty the payment of said $25,000, or any part thereof, *pro rata*, and also that the corporation will fully and completely perform and fulfil the terms of the agreement with the party of the first part." The corporation having failed to pay the $25,000, an action of contract was brought against one of the guarantors to recover one seventh of the $25,000, and he demurred to the declaration on the ground that the undertaking of the guarantors was a joint guaranty, and that the other guarantors should be joined as defendants. *Held*, that the demurrer should be sustained, since the undertaking of the guarantors was a joint guaranty, it not having been intended by the use of the words "*pro rata*" to change the whole character of the undertaking from what expressly was stated in the contract to be a joint guaranty to a several guaranty by each guarantor of only one seventh of the whole $25,000.

By the terms of a contract in writing the party of the second part agreed to pay to the party of the first part $25,000, and seven individuals as parties of the third part agreed to "jointly guaranty the payment of said $25,000, or any part thereof, *pro rata*." After the signing but before the delivery of the contract by F., one of the guarantors, he inquired of the party of the first part as to his liability thereunder, and the party of the first part wrote him a letter stating that he, the party of the first part, had submitted the paper to and had been informed by his attorney that the contract "was a limited one, and not a joint and several agreement, that is to say, each one of the guarantors is liable only for one seventh of the total amount. . . . I therefore advise you that said . . . contract is a *pro rata* one, and that you . . . are only liable for one seventh of the amount underwritten." The party of the second part failed to perform the contract, and the party of the first part duly assigned his interest to one who brought an action for one seventh of $25,000 against F. alone. F. demurred. *Held*, that the letter of the party of the first part to F. did not purport to and did not make a change in the contract nor in any way affect the legal rights of any of the parties, it being merely an expression of opinion on the part of the party of the first part, and it not appearing that the party of the second part and the other six guarantors had any knowledge of it.

A corporation as party of the second part made a contract in writing with an individual as party of the first part, whereby, upon another corporation being formed, the party of the first part agreed to acquire a certain amount of its

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stock and to sell it to the party of the second part for a stipulated price which the party of the second part agreed to pay. An individual joined in the contract as party of the third part, guaranteeing the performance on the part of the party of the second part. The party of the first part fully performed, but the party of the second part did not pay the amount agreed upon. Thereupon the party of the first part executed and delivered an instrument which purported to assign all his rights under the contract to one who in his own name brought an action thereon against the guarantor. The guarantor contended that the contract was not assignable. *Held*, that the contention was not well founded, since, all things necessary to create a liability of the second party to the first party having happened and been performed, the rights of the latter were assignable and the assignee properly brought an action in his own name in accordance with R. L. c. 173, § 4.

A contract in writing by whose terms, upon the organization, later to be accomplished, of a certain corporation by "certain persons" under specified conditions and the acquirement of the title to a certain number of shares of its stock by the party of the first part, the latter agreed to sell and the party of the second part agreed to buy such shares for a certain sum, and various individuals guaranteed that the party of the second part would pay the price agreed upon, is not within the provisions of R. L. c. 74, § 7, providing that a contract for the sale of stock in a corporation shall be void unless the person contracting to sell is, at the time of the making of the contract, the owner or assignee thereof or properly authorized by the owner or assignee or his agent to make such contract.

CONTRACT, in two counts, each upon an agreement in writing. Writ in the Superior Court for the county of Bristol dated December 18, 1903.

The agreement upon which the first count was based was in substance as follows:

"Agreement made this 16th day of July, A. D. 1903, between Paul W. Abbott . . . and A. N. White . . . parties of the first part, the Commonwealth Securities Company, a corporation . . . party of the second part, and the other persons whose names are hereto subscribed, and hereinafter designated as the Guarantors, parties of the third part.

"Whereas, certain persons have agreed to organize a new corporation under the laws of the State of Arizona for the purpose of purchasing the properties of the Anita Consolidated Copper Company, the said corporation to be named the Anita Copper Company, and

"Whereas, the said Anita Copper Company is to be capitalized at $5,000,000 and certain of the stock of the par value of $2,600,000 is to be placed in the treasury of the said Anita Copper Company, the remainder of the par value of $2,400,000 is to be issued for the purchase and acquisition of the properties of the

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said Anita Consolidated Copper Company, and in payment of its debts, and for all other purposes, so that the said property of the said Anita Consolidated Copper Company may become vested in the Anita Copper Company, free from all debts, liens and incumbrances, especially certain royalty liens, amounting in the aggregate to the sum of $250,000. Three of the directors of the said corporation are to be selected from or nominated by the Guarantors, and

"Whereas the parties of the first part have agreed to acquire the title to certain of the shares of the said Anita Copper Company, of the par value of $5 per share, and

"Whereas the said Securities Company desires to purchase thirty-three thousand three hundred and thirty-three shares of the said Anita Copper Company,

"Now, therefore, if the said Anita Copper Company be organized, and the said property acquired free from all incumbrances and liens in the manner hereinbefore set out, the parties hereto agree as follows:

"1. The parties of the first part agree to sell, assign, transfer and deliver to the said Securities Company thirty-three thousand three hundred and thirty-three shares of the stock of the said Anita Copper Company, upon the organization of said Company and its issuance of certificates of stock for the sum of $25,000, the same to be paid on or before November 1, 1903. The parties of the first part also agree that they will not sell any of the stock of the said Anita Copper Company in lots of less than $10,000 par value, while this agreement and a certain other agreement made between the Securities Company and the said Guarantors of even date herewith remains in force.

"2. The Securities Company agrees to purchase thirty-three thousand three hundred and thirty-three shares of the said Anita Copper Company from the parties of the first part, and to pay therefor the sum of $25,000 on or before the first day of November, 1903.

"3. In consideration of the premises, the Guarantors jointly guarantee the payment of said $25,000 or any part thereof *pro rata* and also that the Securities Company will fully and completely perform and fulfil the terms of this agreement with the parties of the first part.

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"In witness whereof, the parties of the first part hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereunto affixed, and these presents signed by Frank B. Keever, its Treasurer, hereunto duly authorized, and the parties of the third part have hereunto set their hands and a common seal the day and year first above written." [Here followed the signatures of Abbott and White, of the Commonwealth Securities Company, and of seven individuals, among them the defendant.]

The agreement upon which the second count was based was exactly like the above agreement, except for a difference in the amounts and the number of shares.

Each count alleged that Abbott and White had assigned their rights under the contract to the plaintiff, and copies of the instruments of assignment under seal were annexed to the declaration.

There were further allegations, *seriatim*, that each condition precedent to demanding performance of the agreements on the part of the guarantors had happened or had been performed.

Further allegations were in substance as follows: Before the delivery of the contracts, the defendant inquired of Abbott and White "as to his liability under" them, and in reply to such inquiry they wrote and sent to him the following letter, "which," each count alleged, "was duly received by the defendant [and] became part of the agreement between the defendant and White and Abbott": "August 20th, 1903. Mr. Walter B. Farmer, Boston, Mass. Dear Sir: In response to your inquiry regarding the liability of the seven guarantors upon the underwriting and contract of the Commonwealth Securities Company to us, we have submitted the papers to our attorneys, and they have advised us that the underwriting and contract is a limited one, and not a joint and several agreement, that is to say, each one of the guarantors is liable only for one seventh of the total amount, that is to say, $75,000. In accordance with such advice from our attorneys, we therefore advise you that said underwriting and contract is a *pro rata* one, and that you and each one of the underwriters or guarantors are only liable for one-seventh of the amount underwritten, to wit, one seventh of $75,000. Trusting that this will answer you fully, we remain, very truly yours, Paul W. Abbott, A. N. White."

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Each count continued: "That the contract of the defendant was a several contract by which he [the defendant] guaranteed the payment to said Abbott and White or their assigns of one seventh of said sum . . . provided the same should not be paid by the Commonwealth Securities Company."

The defendant moved to dismiss the action and demurred, as stated in the opinion. The motion and demurrer were heard before *Raymond*, J., who sustained the demurrer, ordered judgment for the defendant and, at the request and with the consent of the parties, reported the case for determination by this court.

E. D. Stetson & G. Geils, Jr., for the plaintiff, submitted a brief.

E. F. McClennen, for the defendant.

KNOWLTON, C. J. The defendant filed a paper which is entitled "Motion to Dismiss and Demurrer." It begins by stating that six other persons whose names are given are necessary parties defendant in the suit, and avers that therefore the defendant should not be held to answer, and the writ should be abated and the action dismissed. This is an answer in abatement, and it properly raises the first question in the case. Then follows, in the same paper, without waiving the preceding answer, a demurrer setting up these and other facts as grounds of the demurrer. No question is raised by either party on the pleadings.

The question as to nonjoinder arises under the third clause of the contract declared on, which is in these words: "In consideration of the premises the guarantors jointly guaranty the payment of said $25,000, or any part thereof, *pro rata*, and also that the Securities Company will fully and completely perform and fulfil the terms of the agreement with the parties of the first part." The defendant is one of seven guarantors who signed the contract. Is the undertaking contained in this clause joint or several? The words "*pro rata*" are all that create a possibility of a doubt about it. Without these words, even if the word "jointly" were omitted, it would be unquestionably a joint undertaking. *Bartlett* v. *Robbins*, 5 Met. 184. *Donahoe* v. *Emery*, 9 Met. 63. The word "jointly" emphasizes its character by an express statement. Do the words "*pro rata*" change its meaning and legal effect? We think they do not. See *Bartlett* v. *Robbins*, *ubi supra*; *Penniman* v. *Stanley*, 122 Mass. 310. It

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is difficult to understand their exact significance. As here used they are not proper to characterize several action as distinguished from joint action. They more naturally refer to the proportion of the whole amount that the guarantors are to pay jointly, if payment of only a part should be required under the guaranty. The first thing provided for is a guaranty of payment of the whole sum of $25,000, and the second thing provided for is the payment of any part thereof, *pro rata*. It seems to us to be an inapt expression, used to indicate a payment of any proportional part of the whole sum in the same manner and upon the same terms as payment of the whole would be made. We think it was not intended to change the whole character of the undertaking from what is expressly said to be a joint guaranty to a several guaranty by each person of only a fractional one seventh of the whole sum of $25,000 or any part thereof.

The next question is whether the letter written to the defendant by Abbott and White, after the contract was signed and before its delivery, changed its legal effect. We think it plain that it did not. The letter did not suggest a change in the contract, much less did it purport to make a change. It told of the advice of counsel that each of the guarantors was liable for only one seventh of the whole amount, and it expressed the concurrence of the writers in that advice and opinion. There is nothing to indicate that the Commonwealth Securities Company, or either of the six joint guarantors other than the defendant, had any knowledge of the letter. It was a mere expression of opinion as to the legal effect of the contract in writing. This opinion and the expression of it to one of the seven guarantors did not change the contract, or affect the legal rights of any of the parties. The action cannot be maintained without a joinder of the other necessary parties. The same considerations apply alike to both counts of the declaration.

The presiding judge sustained the demurrer and ordered judgment for the defendant. The grounds of his decision are not stated in the report. Very likely they were those which we have already considered. Other grounds of demurrer have been argued by both parties, and it may be well to consider them.

It is contended that the plaintiff cannot maintain his action as assignee of Abbott and White. An action at law brought in

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his own name by the assignee of a chose in action is now permitted by the R. L. c. 173, § 4. Upon the averments of the declaration, it appears that all conditions necessary to create a liability upon the guaranty to White and Abbott have been performed, and, so far as appears, there was nothing more to be done by them at the time of the assignment. The conveyance simply worked a transfer of their right to receive a payment from the guarantors, without affecting the interests of the guarantors. The decisions in *Boston Ice Co.* v. *Potter*, 123 Mass. 28, and *Pike* v. *Waltham*, 168 Mass. 581, cited by the defendant, are not applicable to this case.

Nor can a successful defense be made under the R. L. c. 74, § 7. One of the purposes of this statute is to prevent the making of gambling contracts in the form of sales of stock. This is not an action upon a contract for a sale of a certificate of stock of which the party contracting to sell is not the owner. It is a contract contemplating the performance of various conditions. Among them were the organization of a corporation with a certain capitalization of stock, and the purchase by the corporation of the property of another corporation, and the selection of a part of the directors in a specified way, and the sale of a certain number of shares of this stock to the Commonwealth Securities Company, all of which, according to the averments of the declaration, have been performed. The contract declared on is not void under the statute just cited.

The pleadings and the form of the report leave us doubtful in regard to the order that should be entered. The case was heard upon issues of law, and from the fact that the judge ordered judgment for the defendant after sustaining the demurrer, and then reported the case, we infer that the plaintiff did not desire to amend his writ. There was no formal joinder of an issue of law upon the answer in abatement. On a decision of such an issue against the plaintiff, or upon a similar decision on the demurrer, judgment for the defendant would follow, unless the plaintiff moved to amend his writ. The entry is to be judgment for the defendant, unless within fifteen days the plaintiff shows cause for some other disposition of the case in the Superior Court.

So ordered.

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THOMAS GORDON *vs.* MARGARET GORDON.

Bristol. October 26, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Judgment, Petition to vacate. *Real Action.*

At the hearing of a petition to vacate a judgment which was entered in a writ of entry against the petitioner and others, tenants therein, in favor of the respondent, the demandant therein, except for the interest of one S., who also was a tenant in the suit, it appeared that there was evidence tending to show that the petitioner and all the other tenants excepting S. had executed and delivered to the respondent, the demandant in the writ of entry, a deed of all their interest in the demanded premises, that such deed vested in the respondent a three fourths undivided interest in the premises and left in S. a one fourth undivided interest, and that the petitioner was defaulted in the writ of entry. The judge, before whom the petition to vacate the judgment was heard, dismissed it, and the petitioner excepted. *Held*, that the exception must be overruled since the judge might have found that the petitioner had no interest in the real estate or in the subject matter of the action.

PETITION to vacate a judgment entered in a writ of entry, as stated in the opinion. The petition was filed in the Superior Court for the county of Bristol August 22, 1907.

There was a hearing before *Bell*, J., without a jury. The facts are stated in the opinion. At the close of the evidence, the petitioner requested the judge to rule that "the judgment is void in law," but he refused to do so and ordered that the petition be dismissed "as a matter of discretion." The petitioner alleged exceptions.

The case was submitted on briefs.

C. P. Ryan, for the petitioner.

W. E. Fuller & W. C. Gray, for the respondent.

RUGG, J. This is a petition to vacate a judgment entered in favor of the respondent in a writ of entry sued out by her against the petitioner and others as tenants. It alleged that the petitioner, one Rachael Shea and two others had disseised the demandant of real estate therein described. All the tenants, save Rachael Shea, were defaulted. She pleaded *nul disseisin*, and specified that she owned one undivided quarter interest, subject to the demandant's unassigned dower. The petitioner

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was duly served with process and testified at the trial. After a verdict by the jury judgment was entered for the tenant Shea and on the same day it was ordered "that Margaret Gordon recover against Mary Carey, Thomas Gordon and Isabella Allsop all her right, title and interest with costs of suit."

The exceptions do not purport to report all the evidence, but it appears that there was testimony tending to show that at the trial of the writ of entry it was uncontroverted that a quitclaim deed of the real estate in question to the demandant had been drafted many years before and signed by the four persons named as tenants; that the evidence was conflicting as to whether the deed had been delivered; that Mrs. Shea testified that her signature had been cancelled or erased before the deed was delivered and that the petitioner testified that he signed the deed and wanted the demandant who was his mother to have the property. The only question arises on the petitioner's exceptions to the refusal of the judge of the Superior Court to rule that the judgment in the writ of entry was void.

For aught that appears in this record, the judge may have found that the petitioner with the other tenants named in the writ of entry, except Rachael Shea, had executed and delivered to the respondent a deed of all their interest in the demanded premises, and that this deed vested in her the fee to three undivided fourth parts of the demanded premises and that there was in Rachael Shea the fee of one undivided fourth part. This may perhaps be inferred from the evidence reported. If this was found to be so, then the petitioner had no interest in the subject matter and his petition was properly dismissed. His exceptions do not show that in fact he had any interest in the real estate. Therefore it does not appear that he has suffered any harm by the ruling to which he excepted.

Exceptions overruled.

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PHILIP ROSENBERG *vs.* MYER SCHRAER.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Parties, Findings on master's report. *Partnership. Trust.*

In a suit in equity by a member of a partnership against a third person for an accounting, where it appeared that the plaintiff assigned to the defendant a mortgage worth $675 belonging to the plaintiff individually and $250 of money belonging to the partnership, both to be used by the defendant in paying the creditors of the firm, and the defendant admitted that the $250 was not applied by him to the payment of the debts of the firm, but contended that as the money belonged to the partnership it could be recovered only in a suit brought by all the members of the partnership, it was *held*, that the agreement between the plaintiff and the defendant, so far as it related to partnership property, was made by the plaintiff as trustee for the firm, and that the action was brought properly in the name of the trustee.

Upon an appeal from a decree overruling exceptions to a master's report in a suit in equity, this court may draw inferences of fact from the facts reported by the master, whether the master drew such inferences or not.

BILL IN EQUITY, filed in the Superior Court for the county of Bristol June 6, 1904, for an accounting.

The case was referred to a master, who filed a report, which contained, besides the findings stated in the opinion, the following:

"As to the first item of $250 the plaintiff testified that on the morning of December 11, 1902, he and the defendant went together to the National Union Bank where the plaintiff's firm kept their bank account; that while there the defendant wrote and the plaintiff signed a check for $250 payable to the defendant, which was cashed, the defendant taking the money; that it was agreed between them that this money was to be used in settling with creditors; that Schraer agreed to see Ettenson [the creditor who had attached the firm property] and get this attachment taken off, and that the money was not used as agreed. . . . I think that the plaintiff's story about this transaction is substantially true, and I find that the defendant received from the plaintiff on December 11, 1902, for the purpose and on the agreement stated by the plaintiff, the sum of $250 which has never been repaid, nor applied as agreed. . . . I find

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that the plaintiff made this payment to the defendant without the knowledge of the plaintiff's partners; that the plaintiff owed no considerable debts outside of the firm liabilities, and desired to have the firm liabilities taken care of; that this money was paid to the defendant by the plaintiff out of what both knew were firm funds, for that purpose; and that the plaintiff in making this payment and the agreement with the defendant before stated had in view his own personal advantage, and intended to act on his own account, and not on the firm account."

The defendant excepted to the master's report on the ground that the members of the plaintiff's firm, and not he, should have brought the suit for the $250. The exception was overruled and the report confirmed by *Holmes*, J., and the case was recommitted to the master to give the defendant an opportunity to account for the $250. In a supplemental report the master found that the defendant should be charged with $250. *Dana*, J., confirmed the supplemental report and made a final decree accordingly, from which the defendant appealed.

F. A. Pease, for the defendant.

C. P. Ryan, for the plaintiff, was not called upon.

LORING, J. It appears from the master's report that the plaintiff and three others were partners "in the clothing and furnishing business" before the afternoon of December 11, 1902. On the morning of that day an attachment of the firm property was made, and in the afternoon a general assignment was made by the firm to one Ettenson, attorney for the attaching creditor.

The plaintiff owned as his separate property a mortgage for $775, made by one Perrusse, pledged for a private loan to him, amounting to $100. "Under date of December 10, 1902," the plaintiff assigned this mortgage and on December 11 he paid to the defendant $250, the proceeds of a check drawn on the firm bank account, both to be used in paying the firm debts. The fact that this $250 was the proceeds of a firm check was known to the defendant.

The defendant conceded that the $250 was not applied to the payment of the debts of the firm. His story was that he cashed the check by handing to the plaintiff $150 on December 10, and the balance on the morning of December 11. The master did not believe the defendant's story, and (as we have said) found

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that the $250 was paid to the defendant to be used with the Perrusse mortgage in paying the creditors of the firm.

One of the many contentions put forward by the defendant before the master, and the only one insisted upon here, is that the $250, being firm money, belongs to the firm and not to the plaintiff, and can be recovered only in a suit brought in the name of the firm. In support of this contention he relies on *Hewes* v. *Bayley*, 20 Pick. 96.

The primary fund for the payment of firm debts is firm property. For that reason it was the duty of the defendant to apply the firm's $250 to the payment of the firm's debts in the first instance, and only after that fund had been exhausted to have recourse to the Perrusse mortgage. It would follow that (were there nothing else in the case) since only $250 out of the $900 was not applied to paying the firm debts, the money now in the defendant's hands belongs to the plaintiff and not to the firm.

But there is something else in the case. The master found that after March 31, 1903, "the defendant continued to deal with the plaintiff and to sell the plaintiff goods, the balance due from the plaintiff to the defendant being usually about $200." Shortly before April 5, 1904, the defendant sued the plaintiff for the balance then due. On April 5, 1904, the parties made a settlement by which the plaintiff paid the defendant $175 and the defendant gave the plaintiff a release of all demands in consideration of the $175 and the Perrusse mortgage. The master found "that the Perrusse mortgage became at that time, if it had not become before, the absolute property of the defendant." It appears from the master's report that the Perrusse mortgage had not been collected but that the defendant had made advances against it and used the money so advanced in paying the debts of the plaintiff's firm. How much had been so advanced did not appear.

Had there been originally two agreements, one between the plaintiff's firm and the defendant relating to the $250, and the other between the plaintiff and the defendant relating to the Perrusse mortgage, the result of this release would have been to leave the defendant liable to the firm for misapplication of the $250. The release would have operated to make the $250 the money of the firm as between the plaintiff and the defendant,

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although it would remain the money of the plaintiff as between the plaintiff and his partners.

But we find on the facts stated in the master's report that the defendant made but one agreement, and that the one agreement was an agreement with the plaintiff. It is manifest that there was but one transaction, and it is equally manifest that one accounting only was within the contemplation of the parties. So far as that agreement related to firm property it was made by the plaintiff as trustee for the firm. In such a case the action must be brought in the name of the trustee. *Boyden* v. *Hill*, 198 Mass. 477.

Where exceptions to a master's report raise questions depending on inferences of fact to be drawn from the facts found by the master, it is for the court which has to deal with those exceptions to draw such inferences of fact. *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182.

Decree affirmed.

JAMES BROSNAN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, Railroad.

At the trial of an action against a railroad company for personal injuries received by the plaintiff while in its employ, which were alleged to have been due to the negligence of one acting as a superintendent of the defendant, there was evidence tending to show that the plaintiff was employed as a common laborer about a roundhouse of the defendant, that at the time of the accident he was working under the direction of one who was taking the place of the usual superintendent, the latter being absent on account of illness, that under such direction the plaintiff and others attempted to move a turntable with a locomotive upon it, but were unable to do so, that thereupon the person acting as superintendent directed that a certain rope be procured, which was done, and, with the acting superintendent looking on, one end of the rope was attached to a locomotive not on the turntable, and an iron hook, which was ten or twelve inches long and about two inches in diameter and was fastened to the other end of the rope, was placed in a hole in the coupling attachment of the locomotive on the turntable, that then, under the direction of the acting superintendent, the engine not on the turntable was started and that thereupon the hook straightened out and, because of the tension of the rope, flew through the air and struck

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the plaintiff. It appeared that the plaintiff had assisted to move the turntable under similar circumstances on former occasions, but that never on such occasions had the rope been attached to either of the locomotives by merely placing the hook in a hole of the coupling attachment. *Held*, that there was evidence warranting the submission to the jury of the question whether or not the plaintiff's injury was caused by negligence of a person acting as superintendent of the defendant, and that the plaintiff did not, as matter of law, assume the risk of the injury.

At the trial of an action against a railroad corporation for personal injuries received by the plaintiff while in the employ of the defendant and alleged to have been due to negligence of one in charge of a locomotive engine of the defendant, there was evidence tending to show that the locomotive engine in question was attached by a rope to another engine on a turntable in a yard of the defendant for the purpose of turning the table, that a superintendent of the defendant directed that the engine in question should be started forward and that the person in charge of it started it with a jerk, straightening out and loosening a hook which fastened the rope to the other engine, and that, because of the tension of the rope, the hook flew through the air and struck the plaintiff. *Held*, that there was evidence which would warrant the jury in finding that under the circumstances the person in charge of the engine was negligent in starting it with a jerk.

TORT for injuries alleged to have been received by the plaintiff, while in the defendant's employ, because a hook on a rope, which was being used in the moving of a locomotive engine on a turntable, flew off when the rope was under tension and struck him. Writ in the Superior Court for the county of Bristol dated May 14, 1906.

The case was submitted to the jury on only the second and fourth counts of the declaration, the second being under R. L. c. 106, § 71, cl. 2, alleging negligence of a superintendent of the defendant, and the fourth under cl. 3, alleging negligence of one in charge of a locomotive engine of the defendant.

The trial was before *Raymond*, J. There was evidence tending to show the following facts: At the time of the accident, the plaintiff was employed in the defendant's roundhouse at Taunton as a laborer. On the occasion of the accident, he had been directed by one Kelley (the evidence as to whose employment is stated in the opinion) to move a locomotive on the turntable. Because the locomotive was unevenly balanced on the table, it was found that the men could not move it by hand, and Kelley directed that a rope, usually used for that purpose, be procured, that one end be attached to the locomotive on the table, and the other to a locomotive in the yard. The

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rope had an iron hook ten or twelve inches long and about two inches in diameter on one end, and the workmen placed this hook in a hole in the coupling attachment of the engine on the turntable, without fastening it further, and fastened the other end of the rope to the other engine. Kelley stood by looking on while the rope was being attached to the two engines, and, when it was attached, gave the direction for the engine not on the table to proceed. There was some evidence that that engine went forward with a jerk. The hook straightened out, and, because of the tension on the rope, flew from the coupling attachment and struck the plaintiff.

It also appeared that the plaintiff several times had assisted in moving a locomotive on the table by the use of the additional engine and the same rope, but that on such occasions the rope had been fastened to the locomotive on the turntable by winding it around the knuckle of the coupling attachment, and then fastening it with a hitch, and not merely by putting the hook in the hole in the attachment.

At the close of the evidence, the defendant requested the presiding judge to rule that the plaintiff had assumed the risk of the accident, and that there was no evidence for the jury on either the second or the fourth counts. The requests were refused, the jury found for the plaintiff, and the defendant alleged exceptions.

F. S. Hall, for the defendant.

J. B. Tracy, for the plaintiff.

KNOWLTON, C. J. There was ample evidence to warrant a finding that, during the illness of Phelan for several weeks before the accident, Kelley was employed by the defendant as a superintendent whose sole or principal duty was that of superintendence.

The evidence tended to show that the direct and proximate cause of the accident was the attachment of the rope to the locomotive engine on the turntable by putting the point of the iron hook into the hole in the knuckle where the coupling pin is usually placed, instead of winding the rope around the knuckle and making a hitch with the hook upon the rope. As a result of this, when the other engine, to which the other end of the rope was fastened, started up, the hook straightened

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out and flew, from the strong tension of the rope, and struck the plaintiff on his jaw and caused the injury. The evidence tended strongly to show that this was an unsafe and improper way to fasten the rope, that it was done in the presence and with the knowledge of Kelley, and that Kelley was negligent in permitting it to be done, and in then giving the order to start the other engine.

The jury might well find that the plaintiff was in the exercise of due care. He was in the performance of his duty under the direction of the superintendent. Nor can it be said as a matter of law that he knew and appreciated the risk from this unusual method of using the hook and attaching the rope to the engine. It does not appear that he had ever had experience as to risks of this kind, and he well might trust much to the oversight of the superintendent. The defendant's request for a ruling that the plaintiff could not recover on the second count of his declaration was rightly refused. *Gagnon* v. *Seaconnet Mills*, 165 Mass. 221. *Reynolds* v. *Barnard*, 168 Mass. 226. *Grimaldi* v. *Lane*, 177 Mass. 565.

There was also evidence that the locomotive engine started up with a jerk which naturally would tend to break the connection with the other engine and to expose a man holding the rope to unnecessary danger. The jury might have found from this evidence, although it was contradicted, that the accident was caused by the negligence of the person in charge and control of the locomotive engine, which started up and caused the hook to straighten out and fly and strike the plaintiff. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, 18. *Shea* v. *New York, New Haven, & Hartford Railroad*, 173 Mass. 177. The request that the plaintiff was not entitled to recover on the fourth count of the declaration was rightly refused.

Exceptions overruled.

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MANUEL DE PONTA *vs.* PATRICK DRISCOLL.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Boundary.

Where at the trial in the Superior Court, on an appeal from the Land Court, of an issue framed by a judge of the Land Court, as to the location of the boundary line between the adjoining premises of the demandant and the tenant in a writ of entry as marked by a former fence, the tenant introduces in evidence the report in his favor of the judge of the Land Court, which by St. 1905, c. 288, is made *prima facie* evidence, and also introduces other evidence, to show that the fence was where he says it was, and the demandant introduces evidence to show that the fence was where he says it was, the question is purely one of fact and it cannot be ruled as matter of law that the demandant is entitled to a verdict in his favor.

WRIT OF ENTRY in the Land Court dated October 8, 1906, to recover a triangular strip of land occupied by the tenant, the adjoining premises of the demandant and the tenant at the corner of Stafford Road and Grinnell Street in Fall River both having been purchased in 1871 by one Nathan Law, who in July, 1875, sold to the tenant his lot, and later sold to one Winn the adjoining lot, which Winn sold to the demandant.

In the Land Court the case was tried before *Davis*, J., who ruled as matter of law that the tenant took title under his deed from Nathan Law of July 9, 1875, to the line of the easterly fence then standing, extended to Grinnell Street. His finding was as follows: "I find that said fence stood substantially on the line of the present fence, and I therefore find for the tenant." The demandant appealed. The judge filed a report of his decision in compliance with St. 1905, c. 288.

In the Superior Court the appeal was tried before *White*, J., upon the issues framed by the judge of the Land Court, which are printed below. The character of the evidence is described in the opinion. On all the evidence the demandant asked the judge to rule that he was entitled to recover the triangular strip of land. The judge refused to make this ruling, and submit-

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ted the issues to the jury to which they returned answers as follows:

"1. What was the location of the easterly boundary fence referred to in the deed from Nathan Law to the tenant of July 9, 1875, with reference to the location of the present easterly fence of the lot occupied by the tenant?"

The jury answered: "The location of the easterly boundary fence referred to in the deed from Nathan Law to the tenant, of July 9, 1875, coincided with the location of the present easterly fence of the lot occupied by the tenant."

"2. If the location of the 1875 fence differed from the location of the present fence, has title to the land between the lines of location of said fences been acquired by prescription by either party, and if so by which?"

The jury answered: "No rights by prescription have been acquired by either party."

The demandant alleged exceptions to the refusal of the judge to make the ruling requested by him.

D. R. Radovsky, for the demandant.

C. R. Cummings & J. Little, for the tenant, were not called upon.

MORTON, J. The only exception in this case is to the refusal of the judge to instruct the jury, as requested by the demandant, that he was entitled to recover the triangular piece of land, which, as the case finally went to the jury, was all that there was in dispute between the parties. Whether the demandant or the tenant was entitled to this piece of land depended on where the east line of the tenant's lot and the west line of the demandant's lot was, the two being coincident. This presented a question of fact to be determined according to the evidence. The judge of the Land Court found that the line was where the tenant contended that it was and that the demandant was not entitled to the triangular piece or any part of it. The report of the Land Court, which is made *prima facie* evidence by statute (St. 1905, c. 288) of the facts found so far as they relate to or bear upon any of the questions raised, was introduced by the tenant. There was also other evidence introduced by the tenant tending to show that the line was where he contended that it was, as well as evidence introduced by the demandant tending to show that it was where

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he contended that it was. The question thus presented was, as already observed, entirely one of fact for the jury. It could not be ruled as matter of law that the demandant was entitled to a verdict in his favor.

Exceptions overruled with double costs.

ALBERT N. BLISS & others *vs.* INHABITANTS OF ATTLEBOROUGH.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Way, Public. *Grade Crossing Acts.*

Every part of a public way once duly laid out continues to be such until legally discontinued.

Under the provision of R. L. c. 111, § 152, (St. 1906, c. 463, Part I. § 36,) concerning the abolition of grade crossings, that "The commission shall specify what portion, if any, of an existing public or private way shall be discontinued, the grades for the railroad and the way, the general method of construction and what land or other property it considers necessary to be taken," if a specification of a discontinuance of a portion of a public way under this statute can be found to have been made by implication, which is at least doubtful, a specification, in a report of the commission confirmed by a decree of the Superior Court, that the grade of a certain street shall be changed so that it may be carried under the railroad, that the street shall be graded to a width named and that suitable curbstones, gutters and sidewalks shall be built, following in the report specifications for the grading of some streets and for the discontinuance of parts of others, is not a discontinuance of such portion of the way as lies outside the grade line established by the commissioner's report, and such portion, left at its old grade, still remains a part of the highway subject to the public easement, especially where in taking a parcel from the owner of the adjoining land, whose ownership extends to the middle line of the street, the commissioners describe the parcel as bounded by the line of the street as existing before the report was made.

PETITION, filed on April 21, 1906, for the assessment of damages caused by the abolition of the grade crossing of Park Street in Attleborough by the railroad of the Boston and Providence Railroad Company.

In the Superior Court the case was tried before *White*, J. The property of the petitioner was on the southerly side of

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Park Street next west of the railroad crossing. The decree of the Superior Court, confirming the report of the commissioners, changed the grade of Park Street so that it might be carried under the railroad, and contained the following paragraph:

"Park Street shall be graded to a width as shown on plans at the grades hereby established and the railroad shall be carried over it by a stone arched bridge sufficient for four tracks, with two spans each of forty (40) feet clear width, having a clearance of thirteen (13) feet from the crown of the street to the soffit of the arch on its centre line. Suitable curbstones, gutters, and sidewalks shall be built wherever they now exist or are necessary and the surface of the sidewalk shall be of brick, concrete or gravel, and the roadway shall have a macadam surface."

The work prescribed by the decree was done. The portion of Park Street within the grade lines shown on the commissioners' report was cut down in front of the petitioners' property as therein called for. A portion of the old sidewalk about nine or ten feet wide in front of the petitioners' property was left unchanged; a new sidewalk was constructed farther out at the new grade, as called for by the decree; and a fence or guard rail was erected along the cut in the old sidewalk in front of the petitioners' premises. The result was to leave the petitioners' property in the condition described in the opinion.

At the close of the evidence the petitioners asked the judge to make the following rulings:

1. The petitioners have no right to use for building purposes any land in front of the slanting line shown on the grade crossing abolition plan as the southerly line of Park Street.

2. The southerly line of Park Street is the line of the layout of 1884. The petitioners have no right to build upon any land north of that line.

3. There has been no discontinuance or abandonment of any part of Park Street in front of the petitioners' premises as laid out in 1884.

4. The petitioners have no right to bring their building forward to the cut in the sidewalk.

The judge refused to make these rulings, and also refused to make three other rulings requested by the petitioners, which this

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court found it unnecessary to consider. He instructed the jury in accordance with his ruling as stated in the opinion.

The jury returned a verdict for the petitioners in an amount substantially less than that claimed by the petitioners, although more than that testified to by the respondent's witnesses; and the petitioners alleged exceptions.

J. M. Morton, Jr., (*R. C. Estes* with him,) for the petitioners.

J. L. Hall, for the respondent.

SHELDON, J. The fundamental question in this case is whether the effect of the proceedings for the abolition of the grade crossing of Park Street by the Boston and Providence Railroad was to discontinue that part of Park Street which lay between the petitioners' estate and the line of the new grading of that street. The petitioners' ownership extended to the middle line of the street; and if there was such a discontinuance, the full title to the part so discontinued as a highway reverted to them. There was no vote of the town discontinuing this portion of the street; there was no express provision for its discontinuance or abandonment in the report of the commissioners, which was confirmed by a decree of the Superior Court. But there was ample evidence, and we do not understand that it was disputed, that the effect of the changes in the grade of Park Street and of the construction of the embankment and retaining wall by which the railroad was carried over the street, was such that the part of the highway alleged to have been discontinued was practically, as it was left by the new construction, no longer adapted or available for use as part of the highway, and could not become so except by working it down to the new grade, and even then leaving its width to abut directly against the dead end created by the retaining wall of the railroad embankment.

The contention of the respondent is that the order in the commissioners' report that Park Street should be graded to the width to correspond to the bridge by which the railroad was to be carried over the street with suitable curbstones, gutters and sidewalks, amounted to an alteration or relocation of the street, and that the discontinuance of so much of the old way as was not included in the new location resulted from the alteration *ipso facto*, without any express words of discontinuance. *Johnson* v. *Wyman*, 9 Gray, 186. *Bowley* v. *Walker*, 8 Allen, 21.

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Hobart v. *Plymouth*, 100 Mass. 159. The respondent's counsel refer also to *Commonwealth* v. *Boston & Albany Railroad*, 150 Mass. 174; *Commonwealth* v. *Westborough*, 3 Mass. 406; *Commonwealth* v. *Cambridge*, 7 Mass. 158; *Bliss* v. *Deerfield*, 13 Pick. 102; and *Sprague* v. *Waite*, 17 Pick. 309. But as to most of these decisions it is enough to say that there has been here, as has been stated already, no action by the town or its officers either discontinuing any part of this street or altering or relocating it; and the mere fact that only a part of the space included within the original street lines is wrought for use as a way is not of itself enough to show a discontinuance by the town. No such contention ever has been made to our knowledge; and *Johnson* v. *Wyman*, 9 Gray, 186, is a direct authority against its being made. A way once duly laid out continues to be such until legally discontinued. *Loring* v. *Boston*, 12 Gray, 209. *Harrington* v. *County Commissioners*, 22 Pick. 263. *Stetson* v. *Faxon*, 19 Pick. 147. Nor is it contended that the disclaimer filed by the respondent and not accepted by the petitioners could of itself operate as a discontinuance or abandonment. The case must be determined by the action of the commissioners, upon which the ruling made at the trial was rested.

That ruling was in substance that the report of the commissioners, having been duly confirmed, operated as matter of law as a discontinuance or an abandonment of all that portion of the highway which lay between the petitioners' property and the grade line established in the commissioners' report; and that the land over which the highway was thus discontinued reverted to the petitioners, and the increase thus caused to the value of their estate was to be set off against their damages.

The power of these commissioners was given by R. L. c. 111, §§ 149 *et seq.* See now St. 1906, c. 463, Part I. §§ 29 *et seq.* The commission was required by R. L. c. 111, § 152, (St. 1906, c. 463, Part I. § 36,) to "specify what portion, if any, of an existing public or private way shall be discontinued, the grades for the railroad and the way, the general method of construction and what land or other property it considers necessary to be taken." It is at least doubtful whether under this requirement a discontinuance could be found to have been made by implication. Certainly, when the statute requires specification not only of any

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such discontinuance, but also of the grade which is to be established, it would be yet more difficult to infer one of these requisites from a declaration of the other. But we need not consider this general question; for we are of opinion that their report, which has been laid before us, shows no intention to discontinue this part of Park Street.

The commissioners, having no doubt in mind the requirement of the statute that they should specify what portions of any streets were to be discontinued, have expressly provided in their report for many discontinuances. The provision as to the grade of Park Street is closely preceded by a statement that "the way known as Starkey Avenue is hereby discontinued" within certain limits stated. It is immediately preceded by an order for the change of grade of Hope Street without the discontinuance of any part thereof, and for the grading of Holden Street extension, which the report had just laid out forty feet wide, to a width between certain fences of twenty-six feet. There are also provisions for the discontinuance of parts of Mill Street, South Main Street, Maple Street, Thurber Avenue, and Mendon Road. A new way, called Olive Street Extension, is laid out forty feet wide, and is ordered to be graded to the width of thirty-five feet, so as to cross the railroad by a bridge. Another way, called Thurber Avenue, is laid out in place of that part of Thurber Avenue which was discontinued, forty feet wide, and ordered to be graded to the width of twenty feet, so as to cross the railroad by a bridge of that width.

These examples show clearly that the commissioners had in mind the distinction between the width of the lay-out of a street and the width to which it is to be graded or wrought for travel. They speak with precision of each of these two subjects; they must be taken with references to each of them to have meant just what they said; and there is no ground to infer that they intended a provision for the one to be inferred from a provision for the other. In the absence of any provision for an alteration of the lines of Park Street or for the discontinuance of any part thereof, we cannot say that such a provision is necessarily implied from the language of their report.

Moreover, in describing a parcel of land taken from the petitioners' estate, the commissioners describe it as bounded by the

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line of Park Street, which can mean nothing but the line as existing before the report was made, and certainly indicates that there was no intention to operate a change in that line. But if that line remained unchanged, there could be no discontinuance or abandonment of any part of the existing location of the street.

Accordingly the petitioners' damages should not have been diminished by any set-off for a partial discontinuance or abandonment of the street, and the first four of their requests for rulings should have been given. It does not seem likely that the other questions raised by the exceptions will be presented again in the same way, and they need not be considered.

Exceptions sustained.

LAWRENCE SHERLAG *vs.* SAMUEL J. KELLEY.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Death. Action. Contract, Implied, Performance and breach. *Pleading, Civil*, Declaration. *Damages. Physicians and Surgeons.*

It is settled law in this Commonwealth that unless a remedy is given by statute there can be no recovery for the death of a person wrongfully caused by another, and this rule, as to all elements of damage which arise solely from death, applies to actions of contract as well as to actions of tort.

A husband cannot maintain an action of contract against a physician to recover damages caused by the death of the plaintiff's wife by reason of the defendant's failure to perform his professional services with skill and care when employed by the plaintiff to attend her.

A husband may maintain an action of contract against a physician for a breach of his implied contract to perform his professional services with skill and care when employed by the plaintiff to attend the plaintiff's wife, which caused the plaintiff additional expenses for her nursing, care and treatment, and he is none the less entitled to recover the amount of such expenses because the breach of contract which caused them also caused his wife's death.

It is a general rule of pleading that a breach of contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not show that there was such a breach.

Under our practice act the *ad damnum* is a sufficient allegation of damage in actions of contract as well as in actions of tort in all cases in which special damages are not claimed.

In an action by a husband against a physician for a breach of his implied contract to perform his professional services with skill and care when employed by the plaintiff to attend the plaintiff's wife, where there was no averment of expenses

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incurred by the plaintiff by reason of the defendant's breach of contract, and the declaration contained merely a statement of the contract and an allegation of the breach of it, the only allegation of damage being in the *ad damnum*, the court did not consider the question whether further averments would be necessary to entitle the plaintiff to recover more than nominal damages, the only question before the court being whether the plaintiff had a right of action for damages either nominal or substantial.

CONTRACT with a declaration as follows: "And the plaintiff says that on or about April 4, 1903, the defendant was and still is a physician practicing his profession in Fall River in said county; that on or about said date the defendant held himself out as possessing the knowledge, skill and ability usual among physicians, and that believing the defendant to have such knowledge, skill and ability, he, the plaintiff, employed and paid him to attend his, the plaintiff's, wife in child-birth, and to give her the proper and necessary medical care, attention and services incident thereto, which the defendant promised and agreed to render; yet the defendant not regarding his promise in that behalf, did not render such care, attention and service, but wholly failed and neglected to do so, and so unskilfully, negligently and carelessly attended her, the plaintiff's wife, and so failed to give her due and proper medical care, treatment and attention that she died, so that the plaintiff wholly lost and was utterly deprived of all benefit of her services, care, comfort and society." Writ dated February 10, 1908, alleging damage to the plaintiff in the sum of $5,000.

The defendant demurred, and as causes of demurrer assigned the following:

"1. For that no action of contract by the husband lies to recover damages for the alleged causing of the death of his wife.

"2. For that no action of contract lies by the husband to recover damages for loss of consortium, companionship or services of his wife by reason of her death.

"3. For that the plaintiff cannot recover in an action of contract for alleged injury to his wife resulting in her death as stated in his declaration."

In the Superior Court the case was heard by *Raymond*, J., who sustained the demurrer and ordered judgment for the defendant. From the judgment entered in accordance with this order the plaintiff appealed.

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F. A. Pease, for the plaintiff.

H. A. Dubuque, for the defendant.

KNOWLTON, C. J. The question intended to be raised by the defendant's demurrer to the declaration, and the question principally discussed at the argument is whether, under an action of contract brought upon the implied agreement of a physician with a husband to render necessary and proper medical care and service to his wife in her illness, a recovery can be had for the husband's loss of her society, care and comfort, resulting from her death caused by the defendant's failure to perform his contract.

For many years it has been held in this Commonwealth that, without a statutory provision, no recovery can be had for the death of a person, however wrongfully caused by another. This has been decided in cases where the plaintiff was in such relations to the deceased person that, by reason of the death, he was deprived of valuable legal rights, as in the case of a husband suing for loss of the services and consortium of his wife whose death was caused by the defendant's negligence, (*Carey* v. *Berkshire Railroad*, 1 Cush. 475,) and in a similar case, where the action was brought by a father for loss of services of his minor son. *Skinner* v. *Housatonic Railroad*, 1 Cush. 475. So it was held that a promise to pay an annuity to a widow, on account of the death of her husband through the defendant's negligence, and upon her agreement to forbear to sue, could not be enforced, although she was deprived of her husband's support and of his consortium. *Palfrey* v. *Portland, Saco & Portsmouth Railroad*, 4 Allen, 55. See *Nolin* v. *Pearson*, 191 Mass. 283. It was recognized that in some countries, under different systems of jurisprudence, the law was different. *Carey* v. *Berkshire Railroad*, 1 Cush. 475. But, except as changed by statute, this doctrine is firmly established in the law of this Commonwealth. *Barrett* v. *Dolan*, 130 Mass. 366. *Richardson* v. *New York Central Railroad*, 98 Mass. 85, 89. *Worcester & Suburban Street Railway* v. *Travelers Ins. Co.* 180 Mass. 263, 265. The decisions exclude, as a ground of recovery, all elements of damage which arise solely from death, and as to such damage they are as applicable to actions of contract as to actions of tort.

The whole subject is now covered by statutes, of which some apply only to deaths caused by certain corporations or classes of

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persons, as railroad and street railway corporations, common carriers and employers of labor, and one is general, (R. L. c. 171, § 2, amended by St. 1907, c. 375,) applying to all other corporations and persons. This last statute covers death by negligence, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. The remedy given by it is exclusive of any other in the cases to which it applies; and if the present plaintiff had brought his action seasonably, he would have been entitled to a recovery under it. So far as the plaintiff claims damages growing out of the death of his wife, we are of opinion that the first and second grounds of demurrer are a bar to his recovery.

The third ground of demurrer is as follows: "For that the plaintiff cannot recover in an action of contract for alleged injury to his wife, resulting in her death, as stated in the declaration." If, through a breach of the defendant's contract, there was an injury to the plaintiff's wife that caused him damage, he can recover for it in an action of contract, notwithstanding that it finally resulted in her death. If he was caused additional expenses for her nursing, care and treatment by the defendant's failure to perform his contract he is entitled to damages. The fact that his wife subsequently died from the same cause is immaterial. As to this part of the case the declaration may be considered as if the allegation of death and the consequences of the death were omitted.

The demurrer does not distinctly raise the question whether the declaration is insufficient to permit a recovery of nominal damages or of actual general damages, if any were suffered previous to her death. If the question were raised, we should be obliged to answer it adversely to the defendant. The implied contract is set out, and the defendant's failure to perform it. In *Hagan* v. *Riley*, 13 Gray, 515, Chief Justice Shaw says, "For every breach of a promise made on good consideration the law awards some damage."

The breach is sufficiently alleged. It is a general rule in pleading that a breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach. *Mar-*

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ston v. *Hobbs*, 2 Mass. 433. *Bacon* v. *Lincoln*, 4 Cush. 210. *Fisk* v. *Hicks*, 31 N. H. 535, 541. *Randel* v. *Chesapeake & Delaware Canal Co.* 1 Harr. (Del.) 151, 175. *Karthaus* v. *Owings*, 2 G. & J. (Md.) 430, 441. *Poirier* v. *Gravel*, 88 Cal. 79, 82. *Westbrook* v. *Schmaus*, 51 Kans. 558, 561.

The only averment of damages is general, in the *ad damnum*. Where there are previous averments that show a liability this is enough, unless special damages are claimed. The forms of pleading previously used in this Commonwealth are authorized by the R. L. c. 173, § 130. In the Pub. Sts. c. 167, § 94, under the forms of declarations in actions of tort, is this language: "The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed." In the form of declaration for breach of promise of marriage, there is no reference to the subject of damages, but the claim is left to the *ad damnum*. This is also true of some of the other forms in actions of contract in the same section. The principle is recognized in many cases. *Baldwin* v. *Western Railroad*, 4 Gray, 333. *Prentiss* v. *Barnes*, 6 Allen, 410. *Warner* v. *Bacon*, 8 Gray, 397. *Postlewaite* v. *Wise*, 17 W. Va. 1, 24. *Hoffman* v. *Dickinson*, 31 W. Va. 142, 146. *Louisville, New Albany & Chicago Railroad* v. *Smith*, 58 Ind. 575. *Laraway* v. *Perkins*, 10 N. Y. 371. *Peters* v. *Cooper*, 95 Mich. 191. *McCarty* v. *Beach*, 10 Cal. 461. *Mitchell* v. *Clarke*, 71 Cal. 163, 167. *Packard* v. *Slack*, 32 Vt. 9. *Wilson* v. *Clarke*, 20 Minn. 367. *Hadley* v. *Prather*, 64 Ind. 137. The declaration is sufficient to entitle the plaintiff to recover nominal damages, and general damages if any resulted to the husband from a breach of such a contract as is set out. There being no other averments than the statement of the contract and an allegation of a breach of it, it does not appear whether there will be a claim of general damage to the plaintiff in his wife's lifetime, and we need not consider whether further averments would be necessary to entitle him to anything more than nominal damages.

Because the declaration states a cause of action in the plaintiff, without reference to the averments of the death of his wife and the damages resulting from it, the judgment is reversed and the demurrer is overruled.

So ordered.

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ANTONE BELLEVEAU *vs.* S. C. LOWE SUPPLY COMPANY.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Evidence, Res gestae, Remoteness. *Practice, Civil*, Conduct of trial.

In an action, by a boy nineteen years of age when injured, for personal injuries from being run into from behind by an automobile of the defendant as the plaintiff with two companions of about his own age was walking on a State highway on a very dark evening, there was evidence that as the three boys walked along they were taking precautions against anything coming from behind, and that they listened and in turn looked back. The plaintiff offered to show, as bearing on the question of his due care, that just before the accident one of his companions turned and looked back and said, "There are two cars coming," and then looked back a second time and said, "Let's hurry up, we can catch the second car at Reed's Corner." By other evidence it appeared that what they mistook for the second car was the automobile that ran down the plaintiff. The judge excluded the evidence offered by the plaintiff. *Held*, that this exclusion was error; that it was a question for the jury whether the plaintiff and his companions had not the right to rely upon each other, and that, if they were justified in relying upon each other, what one said to the others as he turned and looked back was competent, in connection with other facts in the case, to show the circumstances under which the plaintiff acted.

In an action for personal injuries from being run into from behind by an automobile of the defendant as the plaintiff, with two companions, was walking on a State highway on a very dark evening, the plaintiff and one of his companions testified that they looked back and saw the defendant's automobile approaching with only one light in front, which led them to think that it was an electric car which would pass them on the track by the side of which they were walking. The defendant called as a witness the chauffeur who was driving the automobile at the time of the accident. He testified that there were four lights on the car and that they all were lighted. On cross-examination he testified that he understood that the law required him to have the number of the machine on the lights or on any two lights in front. He was asked, "Were there any numbers on either light?" and answered "No." At the defendant's request and against the plaintiff's objection, the presiding judge struck out this answer and refused to allow the plaintiff to go into the matter. The plaintiff excepted. He contended that the testimony that there were no numbers on the lamps furnished a reason for not lighting the lamps and therefore would have tended to affect the weight to be given to the testimony of the chauffeur and to corroborate the evidence of the plaintiff that only one lamp was lighted on the automobile. *Held*, that the exception must be overruled, as the judge well might have thought that the connection between the absence of numbers on the lamps and the accident was so remote as to render the evidence of no value, and, if he thought so, its exclusion was proper.

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TORT for personal injuries from being run down by an automobile of the defendant. Writ dated August 15, 1907.

In the Superior Court the case was tried before *Raymond*, J. The jury took a view. The plaintiff offered evidence tending to show the following facts: On January 6, 1907, at about half-past eight o'clock at night, while he was travelling with two other boys of about his age, nineteen years, on the level State highway between Fall River and New Bedford, he was struck by an automobile owned by the defendant, engaged in the defendant's business and in charge of the defendant's chauffeur. At the place where the accident happened the highway was about twenty-five feet wide, and ran east and west. The plaintiff was walking to the west. On the south of the highway were double tracks for the street railway company. Next to the north rail on the north track "there was about five feet of level road, then fifteen feet of macadam, and then five feet more of level road." The plaintiff and the two boys with whom he was walking had ridden over from Fall River on the street car to say good-by to a companion who was moving to New Bedford. They were carried beyond Reed's Corner, which is the fare terminal, and, having got out of the car, they were walking back about three hundred yards to save the nickel fare and to catch at Reed's Corner the car running from New Bedford to Fall River. The night was very dark, and as the boys walked back they kept on the left hand, or southern, half of the highway. One boy, Brodeur, was next to the north rail and about five feet away from it, then came another boy walking at his shoulder, and then the plaintiff, the three walking abreast and close together. The plaintiff testified in his own behalf that when they started back and as they walked along they all three were taking precautions against anything coming on them from behind; that they listened and that in turn they looked back; that when the plaintiff first looked back there was nothing coming from behind; that a little later Brodeur looked back, and right after looking back he spoke to the plaintiff and the other boy; that the plaintiff looked back then and that he saw what he thought to be two cars coming on the north track; that each car had one light in front; that this was about a quarter of a minute before he was hurt; and that later Brodeur looked back just before the first car passed them on the track, and that

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Brodeur, right after looking back, spoke again to the plaintiff and the other boy, and they hurried along; and that very soon after that the plaintiff was struck from behind by the automobile while he was walking on the left half of the highway, and was thrown into the air and injured.

The plaintiff was asked: "What did Brodeur say to you when he turned around and looked back?" The defendant objected, and the plaintiff's counsel offered to show that as the boys walked along they were in part relying on each other to look out for things coming from behind, and warn about them, that Brodeur the first time he turned said: "There are two cars coming," and that the second time he turned he said: "Let's hurry up, we can catch the second car at Reed's Corner." The plaintiff asked the question and made his offer of proof as bearing upon the due care of the plaintiff, but the judge, against the exception of the plaintiff, excluded the question and offer of proof.

Brodeur, called by the plaintiff, testified that back of the place of the accident the road was straight for more than a mile; that, after the plaintiff and the other boy and himself started to walk, the witness looked back twice, and the first time he saw two lights on the track side; that he spoke to the other boys; that all three were paying attention and looking and listening for things coming from behind; that just before the accident and after the first car passed them, the witness looked back and saw what he thought was the second car, and spoke to the plaintiff and the other boy; that what he thought was the second car coming had only one light in front, and that he was led to believe by the one light that it was a street car, but that it was the automobile. The counsel for the plaintiff asked the witness what he said when he turned back the first time and what he said when he turned back the second time, and made the same offer of proof that was made on the questions to the plaintiff. The judge excluded the questions and the plaintiff's offer of proof, and saved the plaintiff's exceptions.

One Marks, the chauffeur who was driving the automobile at the time of the accident, was called as a witness by the defendant and gave an account of the accident which differed from that of the plaintiff. He testified that he was taking the automobile

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from New Bedford to Fall River to meet people who were coming on the train from Providence. His testimony in regard to the lights on the automobile is stated in the opinion. On cross-examination he testified that he understood that the law required him to have the number of the machine on the lights, or on any two lights in front. He then was asked the question, "Were there numbers on either light?" and answered "No," but, at the defendant's request and against the plaintiff's exception, the judge struck out the answer and refused to allow the plaintiff to go into the matter. "The judge's ruling was not in any case based on the ground of discretion." The judge submitted the case to the jury with instructions to which no exceptions were taken. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

C. R. Cummings, (*J. Little* with him,) for the plaintiff.

D. F. Slade, for the defendant.

MORTON, J. This is an action of tort to recover for injuries sustained by the plaintiff in consequence of being run over by an automobile owned and operated by the defendant. There was a verdict for the defendant, and the case is here on exceptions by the plaintiff to the exclusion of certain testimony that was offered by him. We think that there was error in the exclusion of the testimony and that the exceptions must be sustained.

The accident occurred on January 6, 1907, at about half past eight at night while the plaintiff, with two companions of about his own age, was walking toward Fall River on the State highway between Fall River and New Bedford. The night was very dark. The highway ran about east and west, and at the place where the accident happened was about twenty-five feet wide and was straight and level for about a mile in the direction from which the automobile was coming, which was from New Bedford. On the south side of the highway were double tracks for the street railway, next to the north rail of the north track was about five feet of level road, then fifteen feet of macadam, and then five feet more of level road. The plaintiff and his companions kept on the southern or left hand half of the highway. The plaintiff testified that "as they walked along they were all three taking precautions against anything coming on them from behind; that they listened and in turn they looked back." There was

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testimony tending to corroborate this. The plaintiff offered to show as bearing on the question of his due care that just before the accident one of his companions turned and looked back and said, "There are two cars coming," and then looked back a second time and said, "Let's hurry up, we can catch the second car at Reed's Corner." This evidence was excluded. We think that it should have been admitted for the purpose for which it was offered. It could not be ruled as matter of law that the plaintiff and his companions had not the right to rely upon each other. Whether in the exercise of due care they were justified in doing so was for the jury to say. If they were justified in relying upon each other, then what one said to the others as he turned and looked back was clearly competent as tending to show in connection with the other facts in the case the circumstances under which the plaintiff acted and with reference to which his conduct was to be judged. See *Sullivan* v. *Scripture*, 3 Allen, 564.

The defendant called its chauffeur as a witness, and he testified that there were four lamps on the car and that they were all lighted. On cross-examination he testified that he understood that the law required him to have the number of the machine on the lights or on any two lights in front. He was then asked "Were there any numbers on either light?" and he answered "No," but upon the defendant's request and against the plaintiff's objection the judge struck out the answer and refused to allow the plaintiff to go into the matter and the plaintiff excepted. The plaintiff contends that there was evidence tending to show that but one lamp was lighted on the automobile, and that that was what led the plaintiff and his companions to think that the light was that of a street car; and he further contends that testimony that there were no numbers on the lamps would have furnished a reason for not lighting the lamps and would therefore have tended to affect the weight to be given to the chauffeur's testimony, and to corroborate the testimony introduced by the plaintiff. He does not now contend that the violation of law contributed or could have been found to contribute to the accident, and there is nothing to show that he made any such contention at the trial. The judge well may have thought that the connection between the absence of numbers on the

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lamps and the accident was so remote as to render the evidence of no value and have excluded it on that ground. But because of the error in the exclusion of the testimony that was offered as to what was said by the plaintiff's companion the entry must be

Exceptions sustained.

HORACE V. YOUNG *vs.* GEORGE H. SNELL.

Bristol. October 27, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

In an action by a carpenter, employed by the defendant to build an addition to his planing mill, for having parts of two fingers cut off by a buzz planer, which he had been invited to use, and against which he fell when he had stumbled by reason of his foot catching on something on the floor which was covered with shavings, the plaintiff's evidence showed that a week after the accident he went with another carpenter to the place where it occurred and found an old bent nail sticking up in the floor at the distance of about eighteen inches from the bottom of the planer "where it came directly in the way of his right foot," that it protruded above the floor from an inch to an inch and three quarters, that it was in a depression worn in the floor, that the depression looked old, that the nail looked old and was bent over and was worn and shiny, as if it had been trampled on, and there was evidence that the shavings on the floor had not been cleaned up between the time of the accident and the time that the plaintiff found the nail. *Held*, that the evidence warranted the jury in finding that the nail found by the plaintiff a week after the accident was there before the accident and was the cause of it, and that on proper inspection it would have been found by the defendant.

A carpenter who in doing work which he has been employed to do has been invited to use a buzz planer, the floor surrounding which continuously is covered by shavings, and who is injured by falling against the buzz planer by reason of stumbling on an old nail protruding from the floor and hidden by the shavings, is not as matter of law negligent because he has walked to the buzz planer over the floor covered by shavings without sweeping them away and examining the condition of the floor, nor is the risk of injury from the nail, thus continuously covered, assumed by him, it not being an obvious one.

TORT for personal injuries incurred by a carpenter on May 14, 1906, while employed by the defendant to build an addition to his planing mill at Attleborough, in the manner stated in the opinion. Writ dated November 28, 1906.

In the Superior Court the case was tried before *Raymond*, J.,

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who at the close of all the evidence ordered a verdict for the defendant, and, with the consent of the parties, reported the case for determination by this court of the questions of law raised by his ruling. If his ruling was correct, judgment was to be entered for the defendant; if not, judgment was to be entered for the plaintiff, by agreement of the parties, in the sum of $1,000.

F. S. Hall, for the plaintiff.

D. F. Slade, for the defendant.

LORING, J. The plaintiff was hired by the defendant to put up an addition to his planing mill about six weeks before the accident here complained of. He testified that he was invited by the defendant to use the machinery in the mill whenever he had work to be done which could be done more quickly on one of the machines. On the day in question he had occasion to square up a piece of quarter round board and undertook to use the defendant's buzz planer in doing that work. His story was that he found that he did not have the right gauge on; that he went and set the gauge; that he then "went to pick up" the board in question, when something caught his foot and "caused him to stumble" on to the buzz planer which was exposed, and parts of two of his fingers were cut off by the machine. He was alone in the room at the time, and he testified that "it was not light around the machine and you could not see the floor around the machine; that there were a good many shavings on the floor; that these were directly under his feet and all around the planer." The accident was on a Monday.

He further testified that a week later he went to the place with another carpenter who had never worked for the defendant, and found a nail sticking up "about one inch or more" above the floor, and about eighteen inches from the bottom of the planer; "that it was where it came directly in the way of his right foot." He described the nail as "hooked over, the head of it" and "that the head of it was towards him as he stood there working on the machine"; that he saw an "impression in the floor" which indicated that the nail had been in the board; "that the depression looked old" and "the nail looked old"; it had been worn slightly; the nail was not there in the depression but was sticking up from it; the depression was

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about the same length as the part of the nail which stuck up from the floor, and the nail seemed to fit it. When he went there a week after the accident and found the nail "he took a stick and brushed the shavings away and found the nail." The depression showed where the head of the nail had been driven into the wood.

The story of finding the nail was corroborated by the testimony of the carpenter who was with the plaintiff when he went to the factory a week after the accident as has just been stated. He (the carpenter) testified to the shavings, to brushing them aside and finding the nail. He saw that the nail was "sticking up an inch to an inch and three quarters." He also corroborated the plaintiff's story as to the place where the nail was found, adding "it was a sort of a bad place for it"; and as to the nail being bent over, he testified that it "looked as if it was stamped on"; that it "looked to him as if the nail had been tramped on some around there"; that the nail head was bent over; that "the nail was loose in the floor, in the hole in the floor, from being tramped on; that there was a depression under the head of the nail"; "that the nail did not look very new."

The plaintiff's story as to what the nail looked like was further corroborated by one Fitch, who was an employee of the defendant. His testimony confirmed the story told by the plaintiff as to where the nail was, as to its sticking up from the floor, as to its being bent over, and as to the depression in the floor. He also testified "that it appeared to be a nail that had worked itself out of the floor or had been driven in the floor and tipped over by working around by the tramping on it; that it looked like a nail after it was scraped some on the side by the feet of any one there and loosened out of the wood which kind of bent over the head of it; that it looked as if it had been tramped down in the floor as a nail naturally would be that had been tramped on the floor"; and "that the floor was all worn there; that it was worn up under the edge of the planer."

One of the defendant's employees called by the defendant testified that his attention was called to the nail by the plaintiff. He said that the nail was two and a half inches long, and "that about half an inch or three quarters of an inch" of it only "was

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in the floor." His testimony corroborated that of the plaintiff as to where the nail was, as to the nail being bent over, as to its being "worn some" and "shiny"; "that it showed shiny in a part of it where it had been struck by the feet," and "that it was not a new nail." He also testified that between the time of the accident and the time the plaintiff found the nail he did not do any cleaning "as far as he could remember."

There was evidence that the floor about the buzz planer was habitually covered with shavings, and that these shavings were usually cleaned up once a week, on Saturday night; and that it was the duty of the last witness to clean up the shavings at that time.

There was some evidence which tended to contradict what might be inferred from the testimony of the plaintiff and his witnesses. It is not necessary to state what it was, for even if not contradicted the jury could disbelieve it *in toto*. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

The case does not come within *Jennings* v. *Tompkins*, 180 Mass. 302. The nail in the case at bar (if the plaintiff's story was believed) was bent over so as to make a person stumble, and was in such a position with reference to the buzz planer as to make its existence a source of great danger. In addition the jury were warranted in finding that it stood up above the floor from an inch to an inch and three quarters, in place of three sixteenths of an inch, as in *Jennings* v. *Tompkins*.

It is not an infrequent occurrence that the condition in which the locus is found after an accident is of itself alone sufficient evidence of its having been in the same condition before the accident. In *Comerford* v. *Boston*, 187 Mass. 564, the plaintiff was injured by the sidewalk having settled down about two inches below the curbing. There was evidence that, after the accident the facing of the inside of the curbing was "pretty nigh black." This was held sufficient evidence that the sidewalk had been in this condition such a length of time before the accident that the city, by the exercise of reasonable diligence, might have known of it in season to have it remedied within Pub. Sts. c. 52, § 18 (now R. L. c. 51, § 18).

In *Gould* v. *Boston Elevated Railway*, 191 Mass. 396, a seat in an open car fell on the plaintiff by the breaking of the metal-

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lic armature. Evidence that after the accident half of the break of the armature was rusty, black and corroded, was held to be evidence that the crack was an old one, and would have been seen on inspection if due care had been used by the defendant.

Hannan v. *American Steel & Wire Co.* 193 Mass. 127, is another case of the same kind. There an injury was caused by the breaking of an iron bolt, and after the accident it was found that part of the break was fresh and the other part rusty. It was held that the condition in which the bolt was found to be after the accident warranted a finding that there was an old flaw which could have been found had proper inspection been made by the defendant, in the exercise of due care.

In our opinion the case at bar comes within these decisions, and the evidence here warranted the jury in finding that the nail found by the plaintiff a week after the accident was there before it and was the cause of it; and that on proper inspection it would have been found by the defendant.

Further, in our opinion this is not the case of a transitory risk, as in *Donovan* v. *American Linen Co.* 180 Mass. 127, and *McCann* v. *Kennedy*, 167 Mass. 23.

Neither was the accident caused by the neglect of a fellow servant in not sweeping up the shavings. On the uncontradicted testimony the shavings were to be swept up but once a week. There is no evidence that they were not swept up on the Saturday night preceding the Monday on which the accident occurred. The shavings around the planer at the time of the accident might well have been made on that Monday morning. The case therefore does not come within *McRea* v. *Hood Rubber Co.* 187 Mass. 326.

We are also of opinion that the jury were warranted in finding that the accident was not caused by contributory negligence on the part of the plaintiff. They were warranted in finding that the nail was hidden by shavings at the time of the accident. In our opinion a workman cannot be said as matter of law to be guilty of negligence if he walks to a buzz planer over a floor covered by shavings, without sweeping them away and examining the condition of the floor.

Since the floor was habitually covered with shavings, the risk from this nail was not an obvious one, and for that reason

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was not one assumed by the plaintiff as an incident to the employment which he chose to accept.

In accordance with the terms of the report the entry must be

Judgment for the plaintiff in the sum of $1,000.

CHARLES W. RICHARDSON, administrator with the will annexed, *vs.* HARRIET P. MULLERY & others.

Essex. November 4, 1908. — November 24, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Charity, Administration *cy pres*. *Trust*.

A testatrix bequeathed the residue of her estate, at the termination of a life interest, "to be given to the life saving station to be built and established in Marblehead or Nahant, not yet decided upon." The residue amounted to about $6,000. When the will was made the testatrix knew of the intention of the United States government to establish a life saving station in the neighborhood of Nahant. At that time a life saving station had been completed at Nahant, although it did not go into commission until six months later. This station was about four or five miles from the nearest part of the shore of Marblehead. No life saving station has been established at Marblehead and no such establishment is contemplated. The treasurer of the United States filed in the case a disclaimer of any interest in the residue of the estate of the testatrix, by which it appeared that the United States declined the trust. *Held*, that the purpose of the testatrix in devoting her gift to the life saving station was not limited to the maintenance of the station itself, which was the specific object named in the will, but was a charitable wish to be helpful in the general saving of life and relief of suffering in cases of shipwreck in the vicinity of Nahant and Marblehead, and therefore that the gift created a public charity for a general charitable purpose, which, as its administration in the precise way stated in the will had become impossible, would be administered *cy pres*, under a scheme, to be devised by or under the direction of the Probate Court.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on April 5, 1906, by the administrator *de bonis non* with the will annexed of the estate of Harriet M. King, late of Salem, for instructions as to the construction of the residuary clause of that will.

In the Probate Court *Harmon*, J., made a decree appointing trustees to receive the residue for the benefit of the United States Life Saving Station at Nahant and ordering the plaintiff

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as administrator with the will annexed to pay over the residue to such trustees. The decree also contained directions for the guidance of the trustees. The defendants Mullery and Guion, who were nieces of the testatrix claiming as her next of kin, appealed.

The case came on to be heard before *Morton*, J., who, at the request of the parties, reserved it upon the bill, the answers of the several defendants and an agreed statement of facts for determination by the full court, such decree to be entered as law and justice required.

F. M. Ives, for the defendants Mullery and Guion.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Attorney General, submitted a brief.

KNOWLTON, C. J. The petitioner asks for instructions as to the effect of this clause in the will of Harriet M. King, late of Salem, deceased: "I give and bequeath the rest and residue of my estate to my sister, Eliza A. Hoffman, for her use during her life; at her death to be given to the life saving station to be built and established in Marblehead or Nahant, not yet decided upon." The holder of the interest for life having deceased, the question is what shall now be done with the residue, which amounts to about $6,000. It appears by the agreed facts that, when the will was made, the testatrix knew of the intention of the United States government to establish a life saving station in the neighborhood of Nahant. Her will was made on March 19, 1900, and the construction of the life saving station at Nahant was completed on February 18 of the same year, although it is averred in the bill and not denied in the answer that the station did not go into commission until September 13, 1900. This station is on the shore at Nahant, about four or five miles across the bay from the nearest part of the shore of Marblehead. No life saving station has been established at Marblehead and none is contemplated by the United States government or the officers having the life saving service in charge. This station is maintained under the authority of the secretary of the treasury of the United States, acting under a law of the United States. "The building of the station is an accomplished fact and there is no doubt that it will always be maintained by the government." The Congress of the United States has taken no action towards the acceptance of

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the legacy, and the secretary of the treasury has filed in the case a disclaimer of any interest in the residue of the estate of the testatrix. The keeper and crew of six or seven men live in the station, and the keeper has quarters for his family there. No provision is made for the families of the men of the crew.

The gift is "to the life saving station to be built and established," etc. This is equivalent to a gift to the proprietor or proprietors of the life saving station, for the benefit of the station. The charitable nature and object of the gift, and the fact that its benefits are to extend generally to all the members of the class or classes for whose benefit the life saving station is established, make it a public charity. *Johnstone* v. *Swann*, 3 Madd. 457. *Fire Insurance Patrol* v. *Boyd*, 120 Penn. St. 624. *Minns* v. *Billings*, 183 Mass. 126, 129. *Jackson* v. *Phillips*, 14 Allen, 539, 556. *Drury* v. *Natick*, 10 Allen, 169, 178. *Attorney General* v. *Shrewsbury*, 6 Beav. 220. *Attorney General* v. *Day*, [1900] 1 Ch. 31. *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292. *Hamden* v. *Rice*, 24 Conn. 350. *Stuart* v. *Easton*, 74 Fed. Rep. 854. If the United States government, by act of Congress, had accepted the trust, the money would have been paid over to be used for the maintenance and support of the life saving station, in a way to make it as beneficial as possible to those for whose safety and protection it was established. But the United States declines to accept the trust. See *Dickson* v. *United States*, 125 Mass. 311; *State* v. *Blake*, 69 Conn. 64. The management and control of the station is in its owner, the United States government, and no one else can interfere with it. If a trustee were to be appointed by the court to execute the trust, he could not use the money in the way in which the testatrix intended it to be used for the maintenance and support of this station.

The trust has, therefore, become impossible of execution in the exact way contemplated by the testatrix, and we come to the question whether it must fail altogether, or whether it can be administered *cy pres*. That depends upon whether the trust created by the testatrix is limited to the direct maintenance and support of this station by the expenditure of money in aid of the government for that purpose, or whether the charitable purpose was broader, and was intended to include the promotion of the general interests which the station was designed to serve, and kin-

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dred interests in furtherance of a purpose to be helpful in this general field. The question that arises in cases of this kind is often hard to answer, and in the present case it is not free from difficulty. We are of opinion that the desire and purpose of the testatrix in devoting her gift to the life saving station was not limited to the maintenance of the station itself, which is the specific object named in the will, but was a charitable wish to be helpful to persons exposed to the perils of the sea in this neighborhood. We think the precise method of accomplishing her purpose stated in the will was not so important in her thought as the general saving of life and relief of suffering in cases of shipwreck in the vicinity of Nahant and Marblehead. As we interpret the language of the will, any reasonable method of promoting this object was within her general purpose. There may be ways of promoting this object other than by aiding in the maintenance of the station in the way in which the United States government chooses to maintain it. Methods may be adopted for rendering the dangerous service more attractive to the brave men who are needed in it, either by making provision for themselves or their families in case of their misfortune, or in other ways. Or some other scheme may be devised for the use of the money which will be within this general charitable purpose of the testatrix.

The charity should be administered under the doctrine of *cy pres*, under a scheme to be devised by or under the direction of the Probate Court. *Attorney General* v. *Briggs*, 164 Mass. 561. *Weeks* v. *Hobson*, 150 Mass. 377. *Theological Educational Society* v. *Attorney General*, 135 Mass. 285. *Jackson* v. *Phillips*, 14 Allen, 539. Most if not all of the methods of expenditure particularly proposed in the decree of the Probate Court would not be improper for embodiment in such a scheme.

So ordered.

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GRACE L. SNOW *vs.* CHARLES D. ADAMS & another, executors.

Middlesex. November 11, 1908. — November 24, 1908

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Witness, Impeachment.

In an action by a woman against an executor for compensation for services alleged to have been rendered to the defendant's testator, the plaintiff testified that she took full charge of the testator in the daytime, that one M. took charge of him in the night-time, and that M. sometimes relieved her during the daytime while the plaintiff was marketing for the testator. M., being called by the plaintiff, testified that the plaintiff waited on the testator during the day and took care of him unless it was something she could not do alone, when the witness was called to help her. The defendant then offered to show that M. had said that M. herself did all the work night and day and that nobody else did anything for the testator. The presiding judge excluded the evidence. *Held*, that the exclusion of the evidence was erroneous, as the statement, if made, was inconsistent with the statement made by M. upon the stand in a material matter, and had a bearing upon the degree of credit to be given to her testimony.

CONTRACT against the executors of the will of William H. Goodnow, on an account annexed, for compensation for work and labor alleged to have been performed for the defendant's testator from August 1, 1901, to June 15, 1904, at the rate of $12 a week. Writ dated August 27, 1906.

The answer was a general denial. At the trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff in the sum of $1,193; and the defendants alleged exceptions to the exclusion by the judge of certain evidence, which was offered by the defendants to contradict the testimony of a witness for the plaintiff as described in the opinion.

J. J. Higgins, (*A. A. Gleason* with him,) for the defendants.

F. D. Allen, (*L. K. Clark* with him,) for the plaintiff.

HAMMOND, J. This was an action of contract for work performed for the defendants' testator. One of the questions in dispute was the value of the labor; and, as bearing upon that, the time spent by the plaintiff in doing the work became material.

The plaintiff testified that she acted as "nurse, companion, errand girl, bookkeeper, and did everything that the testator wished her to do for him; that she entertained him all the

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time, and her time was fully occupied; that she assisted him at his meals at the table"; and "that her duties occupied her from the time she got up in the morning until eight o'clock at night." She further testified that "in the evening she played cards with the testator; that she took full charge in the daytime, while one Miss Merritt took charge of him in the night time." On cross-examination she testified that Miss Merritt sometimes relieved her during the daytime, when she (the plaintiff) was marketing for the testator.

This Miss Merritt, being called by the plaintiff, testified that "the plaintiff waited on the testator during the day and took care of him unless it was something she could not do alone when the witness was called to help her." There was evidence tending to contradict the plaintiff's evidence in regard to the physical condition of the testator.

In this state of the evidence counsel for the defendants offered to show by a witness then on the stand that Miss Merritt had said that she (Miss Merritt) did all the work night and day, and that nobody else did anything for the testator. That statement, if made by Miss Merritt, was clearly inconsistent with the statement made by her upon the stand in this case in a material matter, and was admissible, not as evidence of things therein stated, but as bearing upon the degree of credit to be given to her statement upon the stand. It should have been admitted.

Exceptions sustained.

JAMES P. DUNN & another *vs.* MAYOR OF TAUNTON.

Bristol. October 26, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Taunton. Municipal Corporations. Sewer Commissioners. Statute.

Section 8 of St. 1904, c. 384, an act relative to sewerage expenses, assessments and charges, and to the powers of the sewer commissioners in the city of Taunton, requires assessments to be made for completed sewers or sections of sewers upon the estates benefited thereby, as soon as in each case this reasonably can be done, so that the expense of construction may be borne in proper proportion by the general taxpayers and those who derive special benefits from the construction, and, if the sewer commissioners neglect to take any action in the

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matter and their delay becomes unreasonable, the mayor of Taunton may remove them under the power given to him by St. 1895, c. 219, § 4, re-enacted in St. 1904, c. 384, § 9, which makes the sewer commissioners of the city of Taunton "subject to removal by the mayor for cause."

SHELDON, J. This is petition for a writ of certiorari to quash the proceedings of the respondent as mayor of the city of Taunton in removing the petitioners from their offices as members of the board of sewer commissioners of that city. At a hearing before a single justice of this court upon the petition and answer and the exhibits attached thereto, the petition was dismissed; and the case comes before us by an appeal from this order.

The respondent, at a hearing upon certain charges preferred by him against the petitioners as a ground for their removal, found that the first of these charges was proved. This charge was that the petitioners had neglected to take any action in the matter of sewer assessments, as provided by St. 1904, c. 384, § 3. That section reads as follows: "The sewer commissioners of said city shall assess the owners of lands hereinafter described within the territory embraced by said system of sewers, by a fixed uniform rate based upon the estimated average cost of all the sewers of said system. In making such estimate and for all purposes under this act, the cost of sewers in said territory which were built prior to the adoption of said system, but which have been made or are to be made a part thereof, shall be taken to be their cost, after a reasonable deduction for depreciation, if any, on account of age and use has been made. Such assessments shall be made as aforesaid on the lands in said territory on every street or way in which the trunk sewer of said system is constructed, or in which there is a common sewer, directly or indirectly connected with said trunk sewer, whether such sewer was built prior or subsequent to the fourteenth day of August, eighteen hundred and ninety-seven, and shall be made according to the frontage of such lands on such street or way, and according to the area of such lands within a fixed depth from such street or way; but no assessment in respect to any such land which, by reason of its grade or level or any other cause, cannot be drained into such sewer, shall be made until such incapacity is removed; and in cases of corner lots and lots abutting on more than one sewered street or way, the same area shall not

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be assessed more than once. The lien hereinafter provided for shall attach to the parcel assessed. If payment has been made of any prior assessment or charge imposed in respect to any such land on account of any common sewer of said sytem, an allowance shall be made for such payment, and the owner shall be assessed for the remainder only. Said sewer commissioners shall certify all assessments made under this section to the collector of taxes of said city for collection. After receiving an assessment list, the collector shall forthwith send notice to each person assessed of the amount of his assessment, in like manner as notices of taxes are sent."

The findings and rulings of the mayor as to this charge, as set out at length in the record, are as follows: "The board of sewer commissioners is a board consisting of three members. William E. Bellamy and the respondents, William B. Granfield and James P. Dunn, were appointed members and took offices on the first Monday in February, 1907, for the term of one, two and three years, respectively. Bellamy served until the expiration of his term, January 31, 1908, and Granfield and Dunn remain in office. It appeared from the records of the board of sewer commissioners and from other competent evidence that no sewer assessments have ever been made as required by the St. 1904, c. 384, § 3, and that from the time the members of the board went into office on the first Monday in February, 1907, to the time of the hearing before me, no steps were taken by such members towards making assessments under the law cited. The statute of 1904 referred to was duly accepted by the city council of Taunton on July 21, 1904. There are about twenty-five miles of sewers in Taunton, of which about twenty-four miles consist of the trunk sewer and of laterals directly or indirectly connected therewith. The twenty-four miles of sewers are part of the system of sewers legally adopted by the city and referred to in the law cited. By the mandatory requirement of § 111 of this law, the sewer commissioners are bound to assess, in the manner specified, the owners of lands on every street or way in which such sewers are located. The statute went into effect over four years ago; the respondents have been in office for more than a year. Prior to their taking office the cost of all the then existing sewers within the system . . . [had] been determined, a

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fixed uniform rate for assessments had been established, by competent experts, and all these things were matter of record. The necessary data for proceeding at once to make assessments as required by the statute referred to, on abutters on the twenty-four miles of sewers above described, were on file in the office of the sewer commissioners; but, as I find on the evidence, the respondents have negligently omitted to make or to take any steps towards making such assessments, I accordingly find that the first charge is sustained.

"On the question whether the neglect of the respondents thus found to comply with the requirements of the law referred to is sufficient cause to justify their removal from office, the circumstances are to be considered. The law which it is the duty of the respondents to obey, but which they have persistently disregarded, is entirely plain, and it was in evidence that their attention was called to it and to the necessity of proceeding under it, when they first took office. No valid excuse for their negligence has been offered by them, and none appears. They did not themselves testify at the hearing, but called Mr. Bellamy, their former associate, as a witness in their behalf. From a stipulation entered into at the hearing that if called they themselves would testify as Mr. Bellamy had testified, and from the argument of their counsel, the position which they take admits of no doubt. They give no intimation that if permitted to remain in office they will comply with the requirements of the law. On the contrary, they contend that they are the exclusive judges as to when, if at all, they shall take action under it, and in support of their contention they have called attention by their counsel to the case of *Fairbanks* v. *Fitchburg*, 132 Mass. 42, 48. The case is an authority against and not for the respondents' contention.

"Apart from the apparent unwillingness of the respondents to make assessments under the law, and the probability that if not removed they would persist in disregarding the law, I conclude from the evidence that the respondents are inexcusably ignorant of the true meaning and scope of the law and of the duties which it imposes on them. This was shown by the testimony of Mr. Bellamy, which, by the stipulation above mentioned, the respondents adopted as their own. Mr. Bellamy testified that the board had made no assessments under the law, because until

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the entire sewer system is substantially completed it is impossible to determine its cost, and, therefore, until the happening of that event, the fixed uniform rate of assessment called for by the law cannot be established, it being necessary in fixing the rate to know the actual cost of all the sewers of the city. In other words, the theory advanced by Mr. Bellamy and concurred in by the respondents is that assessments in accordance with the requirements of the law cannot be made until substantially all the sewers of the city are completed. It is enough to say that it is not the actual cost, but the estimated cost, on which the rate is to be based, and that it may be a hundred years before the entire system is substantially completed, depending upon the growth of the city.

"What the law seeks to accomplish is briefly stated thus: The sewers of the city generally discharged into Mill River. This created a nuisance. To obviate the nuisance, a system of sewers was adopted, the main feature of which is a great trunk sewer, which at present empties into Taunton river, but later on is to take the sewerage to a filtration field in Berkley. All the lateral sewers of the system are to be connected directly or indirectly with the trunk sewer, thereby intercepting the flow of sewage into Mill River. While a sewer of small sections may be sufficient to serve an individual estate, obviously the sewer into which it empties must be larger if it is to receive the flow of several such sewers and so on to the trunk sewer. The latter, of course, is made of great size and therefore at great cost, in order that it may take the flow of all the lateral sewers of the system. As matter of fairness, then, under a system of sewers, the abutter should pay his proportional part of the cost of constructing, not merely the abutting sewer, but of constructing the system of sewers of which it forms a part; and this is just what the law seeks and requires. There are about twenty-four miles of existing sewers in the system of the city, all connected directly or indirectly with the trunk sewer. In order that abutters of these sewers, and on such sewers as may be added to the system from time to time in the future, may be called on to pay what they fairly ought to pay towards the cost of the system, the law provides that assessments shall be made presently on the abutters on existing sewers, who are now enjoying the benefit of the system, and hereafter on abutters on future sewers, when built, at a fixed

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uniform rate based on the estimated average cost of all the sewers of the system. The methods to be employed by the assessing board in determining and laying the assessments are plainly stated in the law, and, in order that no injustice may be done in making assessments on abutters on old sewers, it is provided that allowance shall be made for any assessment which may have been paid in the past. The law is perfectly clear in itself. Moreover, it has been fully discussed and explained in official reports and documents, with which the respondents ought to be familiar.

"The conduct of the respondents in omitting to comply with the requirements of the law shows gross negligence, and, if not intentional disregard of the law, an incapacity to grasp its meaning or an indifference to it for which there appears to be no excuse. The plain inference from all the circumstances is that the respondents are not suitable persons to fill the extremely important position of sewer commissioners. The injury to the public interest which results from their failure to perform their duty and carry out the plain requirements of the law is serious. As I have already said, there are about twenty-four miles of existing sewers which are a part of the system of sewers adopted by the city, having been connected directly or indirectly with the trunk sewer, on account of which assessments should be made. The failure to make these assessments when they could and ought to have been made has deprived the city of the use of very large sums of money to which it is entitled, thereby adding to the burden of general taxation. It appeared in evidence that since the respondents went into office the sewer commissioners have in a few instances imposed a charge for the privilege of entering sewers, but this of course was not in any sense a compliance with the requirements of the law referred to. Moreover, while such a charge might have been permissible under the general statutes before the special law was passed, it probably was not warranted after the special law went into effect. The respondents have not only failed to look after the interests of the city, in that they have omitted to make assessments on account of the sewers which were in existence when they came into office, but they have failed to make assessments on account of the only sewer which they themselves have constructed. They built a

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sewer on West Water Street which cost about $30,000, and it was shown that they have made no assessment on abutters, but have contented themselves with imposing in a single instance a charge for the privilege of entering the sewer.

"Having found on the evidence that the first charge is true, and this being in my opinion sufficient cause for the removal of the respondents, James P. Dunn and William B. Granfield, from office, I do hereby by virtue of the authority vested in me by St. 1904, c. 384, § 9, remove them from office as members of the Board of Sewer Commissioners."

It is provided by St. 1895, c. 219, § 4, that the sewer commissioners of the city of Taunton "shall be subject to removal by the mayor for cause," and this is re-enacted in St. 1904, c. 384, § 9. This is the same provision that was considered in *Hogan* v. *Collins*, 183 Mass. 43, in which it was said by this court that the decision of the mayor upon the facts "is not open to revision here, either to pass upon the weight of the evidence or to determine whether the evidence justified the finding. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206, 212." And in *Gaw* v. *Ashley*, 195 Mass. 173, it was held by this court that the official action of the mayor of a city under a power of removal "for cause" can be revised by this court only when there has been an arbitrary exercise of power, and the cause alleged for the removal is unreasonable and in law insufficient. And see to the same effect *Ayers* v. *Hatch*, 175 Mass. 489.

But the petitioners contend that the cause alleged and found by the mayor is insufficient in law to warrant their removal. They say in their brief that the only question which they seek to present is whether it was their duty, under any and all circumstances, to levy the general assessment provided for by St. 1904, c. 384, § 3, at once upon the completion of any section of the system of sewers, or whether the time of levying the general assessment was a matter resting within the sound discretion of the board, and whether a failure to levy the general assessment as soon as any section of the system was completed was a sufficient cause for their removal from office. They do not now contend, as they apparently contended before the mayor, that the general assessment should be delayed until the time, perhaps in

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the remote future, when the whole system of sewers shall have been completed, so that the assessment may be based upon the actual cost of all the sewers, rather than upon their "estimated average cost," as the statute provides. It would have been difficult, if not impossible, to construe the statute as requiring, or even allowing, such a delay as this, with the protracted uncertainty of both the amount and the time of payment of the incumbrance which, under § 4 of the statute, thus would be cast upon at least a large part of the land in the city for perhaps a very long period of time.

But even the present contention of the petitioners goes too far. The board of which they were members had doubtless a certain discretion as to the time of levying the assessment in question; but it does not follow that on this ground they could delay indefinitely to perform the duty cast upon them. The manifest intent of the statute is to require assessments to be made for completed sewers or sections of sewers upon the estates benefited thereby, as soon in each case as this reasonably can be done, so that the expense of construction may be borne in proper proportion by the general taxpayers and those who derive special benefits from the construction. Upon the findings of the mayor under the first charge, the petitioners neglected to take any action in this matter, and their delay became unreasonable. There is nothing in *Fairbanks* v. *Mayor & Aldermen of Fitchburg*, 132 Mass. 42, 48, which helps the petitioners. That case merely decides that an assessment finally made by an assessing board which is not restricted by any positive rule as to the time of making the assessment cannot be declared to be void because of a delay of some six years in making it. A very different question would have been presented if there had been a direct complaint against the members of that board for their delay. We cannot say that the ruling * asked for by the petitioners should have been given, or that the cause of removal charged and found was insufficient.

* This refers to the following portion of the petition setting forth the proceedings before the mayor:

"At the conclusion of the evidence for the prosecution your petitioners requested the following ruling as to charge 1:

"As the time of levying the assessment under section 3, chapter 384, of the Acts of 1904, was a matter within the discretion of the board, the re-

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The petitioners, apparently desiring to lay the foundation for a contention that the findings of the mayor were unwarranted, have, as they aver, set out in their petition the whole of the evidence presented to the mayor. *Haven* v. *County Commissioners*, 155 Mass. 467, 471. And although there is in the answer no admission of this averment and there has been no agreement upon the subject, still the averment is not denied in the answer. *Weed* v. *Boston*, 172 Mass. 28. But the petitioners have not contended that the findings were not warranted by the evidence, if their request for a ruling was rightly refused; and we have not felt at liberty to go beyond the record. This was not a case in which the respondent introduced extrinsic evidence to show that substantial justice did not require that the proceedings should be quashed, and thus opened the door to the petitioners to offer evidence upon that question. *Ward* v. *Aldermen of Newton*, 181 Mass. 432, and cases there cited.

The decree dismissing the petition must be affirmed.

So ordered.

The case was submitted on briefs.

J. B. Tracy & W. E. Kelley, for the petitioners.

H. F. Hathaway, for the respondent.

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spondents were within their rights as members of said board in not levying a general assessment and this charge is dismissed.

"The mayor refused so to rule, and your petitioners excepted to such refusal to rule.

"Your petitioners then put in evidence as follows:" [Here followed a statement of the testimony of Bellamy.]

The averment in the petition of the reasons for the issuing of a writ of certiorari was as follows:

"Wherefore, your petitioners aver that said action of your respondent in removing your petitioners from their said offices was illegal and void and should be quashed for the following reasons:

"Because said proceedings were not in accordance with the common law and the rules thereof and that this respondent was not justified in law in making said removals.

"Because as a matter of law your petitioners were acting within their legal rights; that under the law it was within their discretion when the general assessment under chapter 384 of the Acts of 1904 should be levied."

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KATHERINE C. WILSON *vs.* PUFFER MANUFACTURING COMPANY.

Essex. November 4, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Appeal, Master's report.

Where on an appeal by the plaintiff in a suit in equity from a decree dismissing the bill, the record showed that the plaintiff filed exceptions to a master's report but did not show that his exceptions were overruled, the defendant stated in his brief before this court that the plaintiff's exceptions to the report were overruled, the case was argued by both parties upon that assumption, and the court considered the case upon that basis.

Where a master's report states findings made by him which are sufficient to dispose of the case and does not report the evidence on which his findings were made, it must be assumed that the evidence warranted the findings.

BILL IN EQUITY, filed in the Superior Court on October 10, 1907, by the proprietor of a small store in Lawrence engaged in selling candies, soda water and small wares, against a corporation engaged in manufacturing soda water apparatus, to enjoin the defendant from removing a soda water fountain and its appurtenances from the plaintiff's store on the alleged pretense that they were forfeited under the terms of a contract of conditional sale, whereas the plaintiff alleged that, owing to the fact that a carbonator furnished by the defendant was worthless and useless and that the defendant had made false and fraudulent representations in regard to the fitness of the carbonator on which the plaintiff had relied to her loss, the plaintiff owed nothing to the defendant, having returned the carbonator and having more than paid for the other parts of the apparatus.

In the Superior Court the case was referred to Colver J. Stone, Esquire, as master. He made a report in which he found for the defendant and recommended that the plaintiff's bill be dismissed. The plaintiff filed eleven objections to the master's report and later filed eleven exceptions founded on the objections.

The case was heard by *Stevens*, J., who made a final decree that the plaintiff's bill be dismissed. The plaintiff appealed.

It did not appear by the report of the appeal before this court

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that the judge made any order in regard to the plaintiff's exceptions. In the brief for the defendant before this court there was the following statement, which is referred to in the opinion: "no evidence was offered except the master's report. The plaintiff's exceptions were all overruled and the court ordered that the plaintiff's bill be dismissed."

J. C. Sanborn, for the plaintiff.

J. A. O'Mahoney, for the defendant, was not called upon.

HAMMOND, J. The record before us does not show that the plaintiff's exceptions to the master's report ever were overruled, or that the plaintiff's appeal was from anything except the final decree. Inasmuch, however, as it is stated in the brief of the defendant that the exceptions to the report were overruled, and as the case has been argued by both parties upon the assumption that such is the fact and that the questions arising thereon are saved to the plaintiff, we have considered the case upon that basis.

Although the master at first excluded certain evidence offered by the plaintiff, he finally admitted it in order to avoid a recommittal of the cause if in the opinion of the court his rulings excluding it should be regarded as erroneous. Upon all the evidence he has found in substance that the carbonator "when delivered and set up in the plaintiff's store corresponded in all respects with the defendant's representations to the plaintiff"; that the plaintiff "failed to show any defect in the carbonator to which the bad quality of the soda was traceable"; that "the defendant made no false and fraudulent representations or misrepresentations to the plaintiff"; and that "there was no breach of warranty." Having made these findings of fact, he found generally for the defendant.

The evidence before the master has not been reported to the court, and it must be assumed that it warrants the findings. Under these circumstances it becomes unnecessary to consider in detail the exceptions to the report. The findings dispose of the case, and we have no occasion to consider the other grounds of defense. Nor do we see any ground for recommittal of the case.

Decree affirmed.

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WILLIAM J. TAYLOR, administrator, *vs.* AUGUSTUS A. HENNESSEY & another.

Essex. November 4, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Elevator.*

If a boy about fifteen years of age, who is employed in a shoe factory and whose duty it is to carry racks of shoes to and from a workman on the third floor of the factory and to use the elevator of the building for that purpose, goes by the elevator to the third floor and, after speaking a word or two with a workman, is seen walking backward toward the elevator well drawing a rack of shoes after him, and, the elevator having risen in the meantime to the next story and the gate being up, he falls down the well and is killed, his administrator cannot recover damages for his death from the boy's employer under R. L. c. 106, as there is nothing to show that he was in the exercise of due care. Upon this issue it does not help the administrator to show that the gate of the elevator well had been repaired by nailing on an extra piece of wood, which made it heavier and caused it sometimes to stay up and sometimes to fall down of its own weight, if the gate was not connected automatically with the elevator and its position did not indicate where the elevator should be, and the boy knew this.

TORT under R. L. c. 106, by the administrator of the estate of Stephen F. Taylor to recover damages for his conscious suffering and death caused by his falling down an elevator well in the defendants' shoe factory at Lynn from the third story to the basement on December 20, 1904. Writ dated March 18, 1905.

At the trial in the Superior Court before *Sanderson*, J., it was agreed that the opening of the counsel for the plaintiff might be taken to be a correct statement of what the evidence for the plaintiff would show, and, by agreement, a motion by the defendants that the jury be directed to return a verdict for the defendants on the opening statement was argued, and the judge at the close of the arguments ruled that there was not sufficient evidence of due care on the part of the plaintiff's intestate, and ordered the jury to return a verdict for the defendants. The plaintiff alleged exceptions.

The case was submitted on briefs.

J. W. Sullivan, for the plaintiff.

N. Matthews, W. G. Thompson & R. Spring, for the defendants.

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HAMMOND, J. So far as material to the question of the due care of the deceased, the case stated by the counsel for the plaintiff in his opening was substantially as follows:

The deceased was a boy fourteen years and eleven months old at the time of the accident. He had been at work upon the premises a week, for one Demaris, who was working by the job at re-lasting shoes for the defendants, who owned and controlled the factory. He had worked previously for some weeks in another factory of the defendants. His duty was to carry racks of shoes to and from Demaris, who worked on the third floor, and for this purpose he used the elevator. About five o'clock in the afternoon of the day of the accident he went upstairs upon the elevator, as he had done many times during the week, in the performance of his duty. Upon arriving at the desired floor, he got out of the elevator on the floor, and spoke a word or two with one La Chappelle, who was working on that floor twelve or fifteen feet from the elevator well. The last that La Chappelle saw of the boy he (the boy) had hold of a rack of shoes and was walking backward toward the well, drawing the rack after him. He had got within two feet of the well when La Chappelle turned back to his work, but immediately heard a loud noise and a cry. The boy had fallen into the well, and was fatally injured.

So far as material the elevator and gate were described as follows: "The gate . . . as originally installed was a balance gate. That is, it was a gate which when thrown up it ran in a groove." It consisted of two bars with cross pieces. As originally constructed the gate, when thrown up, would be held up by a weight connected with it as a balance, like a window weight, but some time before the accident the top bar had been broken and an extra piece had been nailed on, making the gate heavier, so that when thrown up it sometimes stayed up and sometimes fell down of its own weight. The elevator and gate had been in this condition for several months. The plaintiff's evidence did not show whether immediately after the accident the gate was up or down. Except as above stated, "There was nothing on the elevator to tell when it was taken away from that floor, there was no method of locking the elevator at that floor, no bell or anything which would warn one who might expect it to be there that it had gone." Shortly after the boy fell the platform of the

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elevator was found at the floor above. There was light enough for the boy to see.

The evidence would seem to show that the boy who had brought the elevator to the floor stepped out for a few seconds, and then, on his return with the rack of shoes, backed into the well without looking to see whether the elevator was still there, or else he turned around, raised the gate, and then stepped into the well.

It is to be noticed that the gate was not connected automatically with the elevator. The position of the gate did not indicate where the elevator should be and the boy knew it. The case therefore is clearly distinguishable from cases like *Wright* v. *Perry*, 188 Mass. 268, and *Hamilton* v. *Taylor*, 195 Mass. 68, upon which the plaintiff relies. In each of those cases the gate was automatically connected with the elevator and at the time of the accident it indicated by its position that the platform of the elevator was there.

In the case before us there was no such misleading signal. Upon the opening statement it must be held that the deceased was not in the exercise of due care; and hence a verdict for the defendants was rightly ordered.

Exceptions overruled.

JAMES J. KANE *vs.* BOSTON MUTUAL LIFE INSURANCE COMPANY.

Essex. November 5, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Libel and Slander. Agency, Scope of employment. *Insurance. Corporation.*

At the trial of an action of tort against an insurance company to recover for slanders alleged to have been published concerning the plaintiff, an agent for another insurance company, by employees of the defendant whose duty it was to solicit business, the plaintiff offered to prove that slanderous words were published as alleged on October 2 and 10, that the plaintiff consulted an attorney at law who on October 29 and November 5 wrote to the "superintendent of agencies" of the defendant, complaining on the plaintiff's behalf; that the superintendent replied asking for further details and stating that such methods were contrary to express orders of the defendant and that the defendant tried to avoid "such things" as much as possible; that, at the suggestion of the

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superintendent, on November 9 one who had charge for the defendant of the agents of the district in which the plaintiff did business interviewed the plaintiff's attorney and said he would report to the superintendent; that early in December the plaintiff's attorney had a conversation with the defendant's superintendent of agencies in which the latter told the attorney that he could do nothing for the plaintiff in the matter, that he "had a thousand cases like this one of [the plaintiff] in his office if he wanted to push them"; that further slanders of the same nature afterwards were published by the defendant's employees on December 19 and January 1, 3, 8 and 10; and that because of the slanderous statements the plaintiff had lost business which the defendant had got the benefit of. The presiding judge, on the plaintiff's offer of proof, directed a verdict for the defendant. *Held*, that the verdict was directed rightly, since the jury would not have been warranted, from the evidence offered, in finding that the persons who published the slanders had any actual authority from the defendant to do so or acted with its knowledge, or that their acts were ratified by the defendant, nor did the offer include any evidence tending to show that the agents of the defendant, in publishing the slanders, acted within the scope of their employment as soliciting agents.

TORT for slander. Writ in the Superior Court for the County of Essex dated April 20, 1907.

At the trial, which was before *Sanderson*, J., the plaintiff offered to prove the following facts:

That he was an employee of the Columbian National Life Insurance Company previous to September, 1906, and continued in such employ until after the last date mentioned in the plaintiff's declaration, and had been earning about $12 per week, with a varying commission in addition; that three employees of the defendant, whose business was that of soliciting insurance for the defendant, severally published on October 2 and 10, November 1 and December 19, 1906, and upon January 1, 3, 8 and 10, 1907, various oral statements to the effect that the plaintiff was a drunkard, a "rag picker," and dishonest in his business; that about October 22, 1906, the plaintiff consulted his attorney, S. F. Whalen, Esquire, of Gloucester, who thereupon wrote two letters, one to the defendant direct and the other to one Bradley, the superintendent of agencies of the defendant, dated respectively October 29 and November 5, 1906, setting forth the plaintiff's alleged grievance against the defendant and suggesting a conference before proceedings were instituted; that Bradley wrote Mr. Whalen on October 30, 1906, asking for further details and stating, "It is strictly against the order of our home office for any agent to use methods of this kind in obtaining business," and also on November 7, 1906, wrote again,

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stating his regret that he could not come to Mr. Whalen's office but suggesting that one King would call in his stead, and saying, "This is one of the things that we try to avoid all it is possible to do so, and we will co-operate with you in this matter"; that on November 8 or 9, King, who was the defendant's superintendent of agencies for the district which included Gloucester, called on Mr. Whalen at his office, and Mr. Whalen called his attention to the slanderous statements made by the agents of the defendant; that King said he would report to Bradley, and that Whalen would hear from Bradley; that neither the plaintiff nor his attorney did hear from the defendant thereafter; that early in December, 1906, Whalen called at the office of the defendant, and saw Bradley, and told him that he represented the plaintiff, and came to see him in accordance with the suggestion contained in his (Bradley's) letter of November 7, 1906; that Bradley said that he could not do anything for the plaintiff in this matter, and said that he had a thousand cases like this one of Kane's in his office if he wanted to push them.

The plaintiff further offered to prove that his business diminished after the beginning of the slanderous statements set forth in the declaration, and continued diminishing down to the last date mentioned in the plaintiff's declaration, and that he also suffered mentally by reason of these publications; also that a part of the business which he, as agent of the Columbian National Life Insurance Company, lost, went to the defendant corporation.

The presiding judge ruled upon the offer of proof that the plaintiff was not entitled to recover, and directed a verdict for the defendant. The plaintiff alleged exceptions.

J. H. Sisk, (*R. L. Sisk* with him,) for the plaintiff.

A. H. Bullock, (*J. F. Quinn* with him,) for the defendant.

SHELDON, J. It may be assumed that the words alleged to have been uttered by the defendant's agents were spoken of the plaintiff in his business of an insurance solicitor, and that they were actionable. *Lovejoy* v. *Whitcomb*, 174 Mass. 586, 588, and cases cited. But the vital question is whether the defendant corporation can be held responsible for them.

It could not be found that any actual authority had been

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given by the defendant to its solicitors to make the slanderous statements, or that they were made with its knowledge; nor did anything in the plaintiff's offer of proof tend to show that there had been any ratification of these wrongful acts. The letters of Bradley, the defendant's superintendent of agencies, show no such ratification; they express disapproval of what had been done by the solicitors. The mere inaction of the defendant and Bradley's refusal to do anything for the plaintiff cannot indicate a ratification of what did not appear to have been done in the name or behalf of the defendant, or with the help of its resources or for its advantage. Nor is there any evidence that Bradley had authority to ratify these acts. The facts offered to be proved fall far short of what appeared in *Fogg* v. *Boston & Lowell Railroad*, 148 Mass. 513, and *White* v. *Apsley Rubber Co.* 194 Mass. 97. Nor would the facts that the plaintiff's business was diminished after the alleged slanders, and that a part of the business which he lost went to the defendant, be enough to show a ratification in the absence of evidence that the defendant knew these facts. The defendant did not knowingly receive the benefit of its agents' misconduct, and cannot be held on that ground to have ratified and adopted such misconduct. We find nothing in the cases cited by the plaintiff to support his contention on this point.

The plaintiff contends further that the defendant can be held on the ground that the slanders were uttered by its agents in the course of their employment, even though they were uttered without any prior authority or subsequent ratification from the defendant. But his offer of proof raises no such issue. That offer, as to this question, was simply to show that three solicitors of insurance employed by the defendant "severally published the various oral statements as set forth in the several counts of the plaintiff's declaration." These counts charge that "the defendant by its agents and servants" uttered the alleged slanders. There was no offer to prove that what was said by either of the three solicitors was said in the course of his employment or while acting in the apparent scope thereof. Everything that they said may have been uttered wholly outside their employment, and without any reference to their employer. As in *Obertoni* v. *Boston & Maine Railroad*, 186 Mass. 481, the mere doing

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of the acts cannot authorize the inference that they were done in the course of the employment. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534. Manifestly, for such utterances the defendant cannot be held liable.

We do not mean to throw any doubt upon the statement of Lathrop, J., in *Comerford* v. *West End Street Railway*, 164 Mass. 13, 14, that it is at least questionable whether the defendant would have been liable if the utterance of the defamatory words by its agents had been in the course of their employment. *Behre* v. *National Cash Register Co.* 100 Ga. 213. *Singer Manuf. Co.* v. *Taylor*, 150 Ala. 574. *Redditt* v. *Singer Manuf. Co.* 124 N. C. 100. *Hussey* v. *Norfolk Southern Railroad*, 98 N. C. 34. *Dodge* v. *Bradstreet Co.* 59 How. Pr. 104. And see Odgers on Libel & Slander, 265; 10 Cyc. 1216; 18 Am. & Eng. Encyc. of Law, (2d ed.) 1059. It is difficult to say that such a wrong as this could be committed in the agent's service and for the principal's benefit, within the meaning of the rule as stated by Lord Selborne in *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, 326, and by Campbell, J., in *Philadelphia, Wilmington & Baltimore Railroad* v. *Quigley*, 21 How. 202, 210.

Exceptions overruled.

WILLIAM S. BOWDEN & another, trustees, *vs.* ANNIE S. BROWN & others.

Essex. November 5, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Charity, For a specific purpose. *Trust.*

A testatrix by her will, after giving certain legacies, provided as follows: "The remainder shall . . . be given to the town of Marblehead toward the erection of a building that shall be for the sick and poor, those without homes. I leave this in the hands of B., B. and R. of Marblehead." The amount of the residue of the estate was about $8,000. The town of Marblehead at a meeting of the voters declined to accept the legacy. *Held*, that the gift constituted a public charity for a specific purpose, that it was given "toward the erection of a building" by the town, and that the action of the town was equivalent to a refusal to erect such a building, that the purpose stated in the will thus having become impossible of execution, and there being nothing to indicate that the testatrix

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intended to make provision generally for the sick and poor of the town or for those without homes unless they could be provided with a home in a building to be erected for their use, the gift failed, and the residuary estate went to the next of kin of the testatrix.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on October 2, 1908, by the trustees under the will of Sarah E. Goodwin, late of Lynn, for instructions as to the construction of the residuary clause of that will, which is quoted in the opinion.

In the Probate Court *Harmon*, J., made a decree that the plaintiffs should invest the residue of the estate and hold it so invested with its accumulations for the purposes named in the will, instead of paying it over to the next of kin of the testatrix. The defendants Annie S. Brown and others, claiming as the next of kin of the testatrix, appealed.

The case came on to be heard before *Hammond*, J., who, at the request of the parties, reserved it upon the bill and the answers of the several defendants for determination by the full court, such decree to be entered as law and justice might require.

F. M. Ives, for the next of kin.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General for the Attorney General, submitted a brief.

KNOWLTON, C. J. Sarah E. Goodwin, late of Marblehead, deceased, after giving certain legacies in her will, provided as follows: "The remainder shall . . . be given to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. I leave this in the hands of William S. Bowden, Mary G. Brown and William Reynolds of Marblehead." This gift constitutes a public charity. *Richardson* v. *Mullery*, *ante*, 247, and cases cited. But by the terms of the will, it is to go to a designated donee, to be used for a specified purpose, for the benefit of a certain class of sick and poor. The donee, the town of Marblehead, at a meeting of the voters has declined to accept the legacy. It was given "toward the erection of a building" by the town. The action of the town is equivalent to a refusal to erect such a building. It appears that the charity cannot be administered in the way stated in the will. It therefore must fail altogether, unless it

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can be administered under the doctrine of *cy pres*. The question arises whether the purpose of the testatrix was to give her property for this specific charity, or whether her charitable purpose was general, so that the court is authorized to apply the money to some other charity, similar to that mentioned in the will, under a scheme to be devised for that purpose. It is manifest that the amount of the property, which is only about $8,000, is insufficient for the erection and maintenance of such a building as the testatrix contemplated. She expected that the building would be erected and maintained by the town, with such aid as would be derived from the use of her gift. The trust was not for the erection of a building by trustees under her will, entirely from the proceeds of her property. It being impossible to do that which the testatrix had in mind, can we discover a purpose to do something else of a similar character? We think not. There is nothing to indicate that she intended to make provision generally for the sick and poor of the town, or particularly for those without homes, unless they could be provided with a home in a building to be erected for their use. General provision for the sick and poor would seem to include a charity much broader than anything in her contemplation. The case seems to fall within the class where no intent to use the gift for other charitable purposes can be discovered, if it is impossible to execute the particular charity for which provision is made. In such cases the charity fails altogether. Many cases of this kind are found in the books. See *Teele* v. *Bishop of Derry*, 168 Mass. 341; *Bullard* v. *Shirley*, 153 Mass. 559; *Gill* v. *Attorney General*, 197 Mass. 232, 237; *In re White's Trusts*, 33 Ch. D. 449; *Attorney General* v. *Bishop of Oxford*, 1 Bro. C. C. 444, note; 4 Ves. Jr. 421; *Brown* v. *Condit*, 4 Robbins, 440; *Catt* v. *Catt*, 118 App. Div. (N. Y.) 742.

We are of opinion that the gift fails and that the residuary estate must go to the next of kin.

So ordered.

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MICHAEL CASHMAN & another *vs.* JOHN H. PROCTOR.

Essex. November 5, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Contract, Construction, Building contract. *Practice, Civil*, Exceptions.

By a contract in writing a contractor agreed "to provide all labor and materials required in the construction of one stationary coal hoisting tower, cable railroad, etc., on" a certain wharf for its owner, "in accordance with plans and specifications furnished by" the contractor and made a part of the contract, "and to the acceptance of the" owner of the wharf. *Held*, that the provision that the plant should be constructed "to the acceptance" of the owner of the wharf meant, under the circumstances, only that the materials and the construction should be such that a reasonable man ought to be satisfied with the completed work as conforming to the requirements of the contract and specifications, although it might not perform all the work the owner desired of it.

A contractor made with the owner of a wharf a contract in writing to "provide all labor and materials required in the construction of one stationary coal hoisting tower, cable railroad, etc.," on the wharf, in accordance with certain specifications and "to the acceptance of the" owner. In the specifications, which gave a detailed description of the appliances to be furnished, the contractor agreed "to furnish the plant complete, ready to discharge coal and to furnish engineers and other men, at the owner's expense, to operate the same until the same has been thoroughly demonstrated that the plant is working successfully . . . the plant to work perfectly." *Held*, that the contract required that the working of the plant should be successful and perfect when called upon to do the work of which such appliances and machinery as were described in detail in the specifications ought to be capable, and did not require the furnishing of a plant of sufficient capacity to do all the work that the owner might desire.

No exception lies to the refusal of a judge presiding at a trial to grant a request for a ruling which correctly states a proposition of law applicable to the facts of the case, if in his charge to the jury he in substance states the proposition contained in the request, although in different words.

CONTRACT for breach of a contract in writing whereby the defendant, for a certain price, agreed "to provide all labor and materials required in the construction of one stationary coal hoisting tower, cable railroad, etc., on" the plaintiffs' wharf "in accordance with plans and specifications furnished by" the defendant "and to the acceptance of the" plaintiffs. Writ in the Superior Court for the county of Essex dated July 14, 1905.

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The specifications, which were made a part of the declaration, required, among other things, a bucket engine, a trolley engine and a cable road engine which were specifically described as to size and style, but there were no requirements as to capacity for work. A boiler of a certain size also was required, and it was agreed that it was "guaranteed for one hundred pounds steam working pressure . . . and in every respect first class." All fittings were required to be "attached to a boiler in a first class manner." At the end of the specifications was the following: "We propose to finish the plant complete, ready to discharge coal and to furnish engineers and other men, at the owner's expense, to operate the same until it has been thoroughly demonstrated that the plant is working successfully . . . the plant to work perfectly."

The breaches of the contract alleged in the declaration were that the defendant "failed to erect a plant first-class in every respect and erected a plant that would not, did not and never has worked perfectly, and that the boiler furnished under said contract and above referred to would not maintain one hundred pounds steam working pressure; the trolley engine and boiler furnished by the defendant was in all respects inadequate and too small to do the work required of it, and the plant in many other respects was wholly inadequate for said work; and incapable of handling and discharging the plaintiffs' coal as required."

At the trial, which was before *White*, J., there was conflicting evidence as to whether the specification in regard to the boiler meant that it would maintain one hundred pounds steam working pressure, or that it indicated that one hundred pounds pressure was its maximum strength. There also was conflicting evidence as to whether the appliances called for by the contract were properly arranged mechanically.

At the close of the evidence, the plaintiffs requested the following among other rulings:

"2. The defendant agreed to erect the plant to the acceptance of the plaintiffs, and if he failed to do this the plaintiffs are entitled to recover their damages suffered by reason of this failure.

"3. The fair construction of the contract and specifications

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is that the defendant warranted that the plant would work perfectly, and it is for the jury to say if it did work perfectly.

"4. The fair construction of the contract and specifications is that the defendant warranted that the plant when erected would work successfully, and it is for the jury to say if it did work successfully.

"5. Upon a fair construction of the contract and specifications and upon all the evidence, there was a warranty that the plant would work successfully or perfectly while doing the work the plaintiffs might reasonably require of it in their business.

"6. The clause in the specifications as follows 'the plant to work perfectly,' constitutes a warranty on the part of the defendant.

"7. The fair construction of the words 'ready to discharge coal,' taking into consideration all the circumstances of the parties at the time the contract was made, and in connection with the other parts of the contract, is that the plant would at its completion discharge coal satisfactorily and if the jury find that the plant was unable to discharge coal satisfactorily there was a breach of the defendant's contract."

The manner in which the rulings were dealt with by the presiding judge is stated in the opinion. In his charge to the jury, the presiding judge stated, among other things: If the defendant "put in just the mechanical appliances which he agreed to put in and put them in mechanically correctly then he fulfilled his contract. That is, if the defendant furnished a plant in accordance with the plans and specifications and it worked perfectly mechanically it is immaterial whether or not it was of sufficient capacity to do the work required of it by the plaintiffs. That is, he was bound to have the arrangement of things and the machinery which he put in, he must have that in perfect mechanical operation in order to complete his contract, and nothing more, unless you should find in regard to the engine — so far as the other things are involved outside of the engine, and as to the engine also, if you should find that the guaranty of the engine was simply of its strength and not of the amount of work it was to accomplish."

There was a verdict for the defendant and the plaintiffs alleged exceptions.

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W. F. White, (*N. N. Jones* with him,) for the plaintiffs.

F. C. Allen, for the defendant.

SHELDON, J. The plaintiffs' second request was properly refused. The provision in the contract that the plant should be constructed "to the acceptance" of the plaintiffs, meant under the circumstances here existing only that the materials and the construction should be such that a reasonable man, in view of the specifications incorporated into the contract, ought to be satisfied with the completed work as conforming to the requirements of the contract and specifications. *Lockwood Manuf. Co.* v. *Mason Regulator Co.* 183 Mass. 25. *Noyes* v. *Eastern Accident Association*, 190 Mass. 171, 182. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 199 Mass. 220. A reasonable man would not have refused to accept this work, if it complied with all the terms and stipulations of the contract and specifications, merely because its capacity was not sufficient to do all the work that he desired. Under the contentions made by the parties in this case, that was the actual effect of the modification of this request made by the judge.

The third, fourth, fifth and sixth requests were given in substance, but subject to a modification similar to that already stated, i. e., that what the defendant was required to do was to "put in just the mechanical appliances which he agreed to put in, and put them in mechanically correctly"; and that "if the defendant furnished a plant in accordance with the plans and specifications and it worked perfectly, mechanically, it [was] immaterial whether or not it was of sufficient capacity to do the work required of it by the plaintiffs." This was correct. *Brummett* v. *Nemo Heater Co.* 177 Mass. 480. *Morse, Williams & Co.* v. *Puffer*, 182 Mass. 423. The agreement was not to furnish a plant which should be of sufficient capacity to do all the work that the plaintiffs might desire, but to furnish certain carefully described appliances and machinery, and that the plant constructed from them should work successfully and perfectly; which must mean only that the working should be successful and perfect when called upon to do the work of which such appliances and machinery ought to be capable. These words cannot be extended to include the successful and perfect accomplishment of work beyond the capacity of such a plant. To

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the extent that we have stated, these words were treated as creating a warranty; and it is immaterial that this word was not used by the judge. *Parker* v. *Springfield*, 147 Mass. 391.

The seventh request was given in substance with the modification already stated; and for the reasons mentioned above we are of opinion that the modification was correct.

The eighth request is not now insisted upon.

The ninth, tenth, eleventh and twelfth prayers no doubt state correct rules of law. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 199 Mass. 22. That is, the matters spoken of in these requests were not conclusive against the plaintiffs as matter of law. It was their right to have this issue submitted to the jury. But this was done. In substance, accordingly, these requests were given. And we cannot say that this exception is open to the plaintiffs. The judge evidently considered that he had given these requests; for he said to the plaintiffs' counsel at the end of his charge, that he had given substantially their requests numbered from two to twelve, with the modification which has been stated; and the plaintiff's counsel, apparently consenting to this, desired only to except to that modification and to another specific part of the charge, which has been already considered.

For the same reason the plaintiffs' contention before us in argument that the judge should have ruled in terms upon the question whether there was an express or implied warranty that the plant would do the work for which it was constructed, is not open upon these exceptions. Apart from the fact that this question was in substance submitted to the jury, if the plaintiffs desired more specific instructions upon it, they should have asked for them.

Exceptions overruled.

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SARAH A. PEABODY *vs.* HAVERHILL, GEORGETOWN AND DANVERS STREET RAILWAY COMPANY.

DANIEL A. PEABODY *vs.* SAME.

Essex. November 6, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Street railway, Imputed. *Infant. Parent and Child.*

In an action by a woman against a street railway company for personal injuries alleged to have been received from being thrown from a buggy when it was run into by an electric car of the defendant, there was evidence tending to show that the buggy was a Goddard buggy and was the property of and was being driven by a son of the plaintiff, who was twenty years of age, that the plaintiff was in it on the invitation of her son, that it was being driven down a driveway to the street in front of her house on which the tracks of the defendant ran, that the top of the buggy was up and that there were obstructions which cut off her view of the street in the direction from which the car came. A third occupant of the buggy testified that at a suitable place the plaintiff looked in the direction from which the car came. There also was evidence tending to show that there was a noisy brook in the immediate neighborhood, that the car was behindhand, running fast, and that no warning signal was given as it approached. At the time of the trial the plaintiff was insane and unable to testify. *Held*, that there was evidence warranting a finding that the plaintiff was in the exercise of due care.

At the trial of an action by a woman for personal injuries alleged to have been received from being thrown from a buggy because of a collision with an electric street car, there was evidence tending to show that the buggy was being driven by the plaintiff's son, whose negligence contributed to cause the accident, that the son was twenty years old and owned the horse and buggy, that the plaintiff was with him at his invitation on a journey from her home to see a friend of his, and that she did not exert any control over the manner in which her son drove. It also appeared that, after the journey had begun, upon the plaintiff's discovering that she had left her glasses behind, the son drove back to get them for her. There was further evidence tending to show, and the jury in answer to a special question found, that the plaintiff did not rely solely on the care and diligence of her son in driving. The presiding judge refused to rule that the negligence of the son should be imputed to the plaintiff, and the defendant excepted. *Held*, that the exception must be overruled, since the mere existence of the relation of parent and child did not cause the negligence of the son to be imputed to the plaintiff as a matter of law, and that the jury had a right to find that no relation of principal and agent or of master and servant existed between the plaintiff and her son, but that she was merely his invited guest, not depending exclusively upon his care as a driver.

Evidence that the motorman of an electric car, in approaching a driveway leading from a dwelling house directly upon the electric car tracks in the highway at a time which was not the car's regular time, ran the car at an excessive rate of speed and without any warning signals, that when more than one hundred feet

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from the driveway he saw a carriage coming out on it, that he could have stopped his car within that distance, but, instead of doing so, although applying his brakes at first, he then put on the power and tried to get past the end of the driveway before the carriage reached the car tracks, and that the car ran into the carriage, will warrant a finding that the collision was caused by the motorman's negligence.

TWO ACTIONS OF TORT, the first for personal injuries alleged to have been received by the plaintiff by her being thrown from a carriage because of its being run into by an electric car of the defendant negligently operated. The second action was by the husband of the plaintiff in the first and sought recovery for loss of the wife's society and services and for the expenses of medical attendance. (The plaintiff in the first action hereinafter will be called the plaintiff.) Writs in the Superior Court for the county of Essex dated November 15, 1902.

There was a trial before *Bell*, J. Just before the accident, the plaintiff was being driven in a Goddard buggy with the top up down a driveway to the street in front of her house upon which and near the side of the street where the plaintiff's house stood, the tracks of the defendant ran. Besides herself, there were in the buggy her son, who was driving, and a farmhand, one Badger. Badger and she occupied the seat and her son sat upon Badger's lap. Other facts are stated in the opinion.

At the close of the evidence, the defendant requested the presiding judge to rule that the negligence of the plaintiff's son was imputable to the plaintiff, and that there was not sufficient evidence of due care on the part of the plaintiff or of negligence on the part of the defendant to warrant a submission of the case to the jury. The requests were refused.

The following special question was submitted to the jury: "Did the plaintiff, in approaching the track, rely solely on the care and diligence of her son?" The jury answered "No."

There were verdicts for both plaintiffs and the defendant alleged exceptions.

R. H. Sherman, (*W. J. McDonald* with him,) for the plaintiffs.

J. P. Sweeney, for the defendant.

SHELDON, J. We cannot say that there was not some evidence for the jury to consider on the question of the due care of the female plaintiff. She was being driven by her son, a young man of about twenty years, in his buggy drawn by his

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horse. As in *Chadbourne* v. *Springfield Street Railway*, 199 Mass. 574, she seems to have conducted herself as his invited guest, and due care on her part may have required that she should not attempt to do otherwise, or in any way to control or interfere with his mode of driving and management of the team. She had no reason to anticipate negligence on his part. And there was evidence that at a suitable place she leaned forward and looked in the direction from which a car would come. She was insane at the time of the trial, and did not testify. But from all the circumstances the jury might have inferred that she looked for an approaching car and saw none. They might say that her failure to see or hear the car did not show negligence on her part, because of the obstructions to the view from the driveway and of the noise of the brook which ran across the street, and because, as might be found, no bell was rung or other signal given from the car itself. See *Beale* v. *Old Colony Street Railway*, 196 Mass. 119; *Fitzhugh* v. *Boston & Maine Railroad*, 195 Mass. 202; *Evenson* v. *Lexington & Boston Street Railway*, 187 Mass. 77. It was not the regular time for a car to pass; and this fact was not without some significance, although cars were occasionally late. In view of all these circumstances, although the question is close and the evidence was undoubtedly meagre, the jury had a right to find that she was herself in the exercise of proper care.

There was undoubtedly evidence that her son who was driving the buggy was guilty of negligence which contributed to the accident, and the defendant's counsel contend that this negligence should be imputed to her, both because they were engaged in a common enterprise, and because of the relation of parent and minor child which existed between them. But we are of opinion that the jury had a right to say that she stood in the position of a mere guest of her son, that she exercised no control over his actions in driving the carriage, and that she ought not to be held responsible for his negligence.

There was evidence that she went at his invitation to visit a friend of his in Haverhill. The fact that after the start from her house she found that she had left her glasses behind and that her son drove back to get them for her, did not necessarily make him her agent or servant; he may have done it simply

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as a kindly act and not in obedience to an order from her. The jury could find that her position was and continued to be that of an invited guest. Of course in that event they were not in any sense engaged in a common enterprise.

Nor is the mere relation of parent and child decisive upon this question.* Undoubtedly, if a father is driving his young child, or if a child is driving his parent while under the general control or the special supervision of the latter, the negligence of the one who was driving would be imputed to the other. And undoubtedly the relationship of parent and child would make it easier to infer the existence of supervision and control than if the question arose between mere strangers; and this is especially so if the child is a minor. But ordinarily and in the absence of special circumstances the question is one of fact, and the test is whether the relation of principal and agent or master and servant existed at the time, where there has not been, as the jury have found that there was not here, an exclusive dependence upon the care of the driver, that is, "a voluntary, unconstrained, non-contractual surrender of all care" to the caution of the driver. *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309, 323. This has been the rule applied in principle in our own later cases. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. *Miller* v. *Boston & Northern Street Railway*, 197 Mass. 535. *Chadbourne* v. *Springfield Street Rail-*

* On cross-examination the son testified as follows: "The homestead farm that my mother owned embraces fifteen acres on one side of the street and some on the other side, and adjoining this farm was nine acres of cultivated land that belonged to me. I cultivated it jointly with my mother and the products from my land went in with that from the rest of the farm. The horse and buggy belonged to me and it was used by all of the members of the family. Badger [the farm hand] hitched it up and drove it some and it was opened to my mother's use if she wanted it; Badger hitched it up and drove her in it and sometimes I drove her and sometimes she drove it. The horse and buggy were for the use of all the family and any of the family could use it, father, mother or hired man. The horse was used to work both pieces of land, the land which belonged to me and that which belonged to my mother." It also appeared that the husband was and had been for many years mentally feeble as the result of a sun stroke, and the active management of the farm devolved upon the plaintiff with the assistance of her son. She kept the books of account and worked in the fields and exercised a general supervision and control of affairs.

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way, 199 Mass. 574. It is the rule which has been approved in other jurisdictions. *Weldon* v. *Third Avenue Railroad*, 3 App. Div. (N. Y.) 370. *Boone County Commissioners* v. *Mutchler*, 137 Ind. 140, 149. *Buckler* v. *Newman*, 116 Ill. App. 546.

There was evidence to justify a finding that the collision was due to the negligence of the defendant's motorman in running his car to and over the plaintiff's driveway at an excessive rate of speed, without any warning signals, at a time when in the regular course of things it was not to be expected. He himself testified that he saw the plaintiff's carriage when his car was at a point which by measurement was more than a hundred feet from the place of the accident, that he could stop his car in a distance of from ninety to a hundred feet; that although he applied his brakes at first, he then let them off and put on his power and tried to get by the end of the driveway before the horse should reach the car tracks. He gave other testimony, and there was other evidence in the case which would amply have justified a finding for the defendant; but the whole question was for the jury.

Accordingly, in each case judgment must be entered on the verdict; and it is

So ordered.

BERTRAM WHITMORE *vs.* H. K. WEBSTER COMPANY.

Essex. November 6, 1908. — November 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action of tort for personal injuries by an employee against his employer, who owned and operated a mill, it appeared that the plaintiff was injured by having his fingers caught between the rollers of a roller mill, that he was fifty-eight years old, experienced in the work of grinding and had been employed by the defendant in his mill for three years, and that the only grinding mills used by the defendant for about six months before the accident were such as he was injured upon; that some time before the accident the mill upon which the plaintiff was injured had been rendered defective by reason of a belt having been made too short, and that the plaintiff had known of the defect but had been told by the head miller almost two months before the accident that the head miller "would have the belt man come as soon as" he "could get

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him and make that belt longer"; that when injured the plaintiff was reaching his fingers between the rollers of the mill to perform a duty which would have been proper if the mill had been at rest, that he had just seen the head miller raise a counter shaft to stop the mill and had proceeded on the assumption that the mill had stopped, as it would have done if the shortness of the belt had been remedied, but that, it not having stopped, his fingers were caught and he was injured. It also appeared that the plaintiff knew that he could have learned whether the mill had stopped if he had looked at some belts and pulleys which were near at hand and in plain view, but that he did not look, although he did not know whether the defective belt had been repaired and knew the danger of doing as he did if the mill still were running. *Held*, that the plaintiff was not in the exercise of due care.

TORT for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant in its grinding mill. Writ in the Superior Court for the county of Essex dated January 8, 1906.

There was a trial before *Dana*, J. The facts are stated in the opinion. At the close of the plaintiff's evidence, the presiding judge directed a verdict for the defendant and, by agreement of the parties, reported the case for determination by this court, judgment to be entered on the verdict if his ruling was right; otherwise judgment to be entered for the plaintiff for the sum of $3,500.

J. P. Sweeney, for the plaintiff.

W. I. Badger, for the defendant.

SHELDON, J. The plaintiff was injured in consequence of having inserted his hand into the feeder and rolls of a grinding mill, to clean away corn which had gathered upon the rolls. Martin, the miller, had raised the counter-shaft to stop the mill, but by reason of the belt which operated the driving pulley having been recently made too short, or the pulley having been raised too high, the effect of what Martin did was, as it might have been found, to stop only one set of the rollers, the slow rollers as they were called, and to leave the other set, the fast rollers, revolving, although more slowly than if Martin had not endeavored to stop the mill. The plaintiff had seen what Martin did, supposed that the mill had stopped, and inserted his hand for a proper purpose and in what would have been a proper manner if the mill had been wholly stopped.*

* The bill of exceptions states also: "The plaintiff, who was fifty-eight years of age, was experienced in the work of grinding and had entered the

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The first question presented is whether the jury had a right to find that the plaintiff was in the exercise of due care in acting on the assumption that the mill had been stopped by what Martin had done. He knew that the belt had been shortened, and that in consequence of this the mill was likely not wholly to stop because the belt was too tight, but he had been told by Martin that this would be remedied.* Whether it had been remedied he did not know, and apparently he did not concern himself with the question. He did not contend that he acted in reliance on Martin's statement. But Webber, an expert witness called by the plaintiff, testified that if the belt was in motion it could be seen plainly, and that the pulleys would revolve so that they could be seen. And the plaintiff himself testified that standing where he was, on the back side of the machine, the differential side as it was called, the belt on the driving side came down on his right, and by looking at the belt he could have seen whether the rolls were moving or not; that if he had looked he would have seen this at a glance; that he put his hand down between the rolls, knowing that if either one of them was moving they probably would take his fingers off, without looking either at the belt or the rolls, or the pulleys, to see whether they were moving. He testified that he could not see the rolls; but the belt and the pulleys on the side where he was were plainly visible. There was no other testimony inconsistent with this. There is nothing to show that he needed or was expected to act so quickly as to excuse him from looking at what was obvious to be seen. In our opinion it cannot be said that in thus failing to use his senses to guard against a danger of which he was well aware he was in the exercise of proper diligence. *Daily* v. *Fiberloid Co.* 186 Mass. 318. *Meunier* v. *Chemical Paper Co.* 180 Mass. 109. *Kelley* v. *Calumet Woolen Co.* 177 Mass. 128.

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employ of the defendant in 1902." Until May, 1905, grinding stones were used by the defendant, but from May, 1905, the mills, upon one of which the plaintiff was injured, were used. The accident happened October 28, 1905.

* This the plaintiff testified was on September 5, 1905, and that Martin had said: "I will have the belt man come as soon as I can get him and make that belt longer."

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Silvia v. *Wampanoag Mills*, 177 Mass. 194. *Robinska* v. *Lyman Mills*, 174 Mass. 432.

The verdict for the defendant was ordered rightly; and in accordance with the terms of the report there must be

Judgment on the verdict.

ANN HERLIHY, administratrix, *vs.* ALEXANDER E. LITTLE & another.

CHARLES W. CRANE, administrator, *vs.* SAME.

Essex. November 4, 1908. — November 27, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Practice, Civil, Amendment, Conduct of trial, Ordering verdict. *Negligence*, Employer's liability, Causing death. *Employers' Liability Act*, Notice.

The declaration in an action of tort against an employer, brought by one describing himself as the administrator of the estate of an employee of the defendant, alleged in a first count that by reason of negligence on the part of the defendant the plaintiff's intestate was "mortally wounded and killed," in a second count that he "was greatly injured and died in consequence thereof," and in the third and fourth counts that he was riding in an elevator which fell "thereby inflicting great injury . . . in consequence of which injury he died." The notice which had been given to the defendant under R. L. c. 106, § 75, stated that the death was preceded by conscious suffering. Before the trial, the plaintiff moved to amend the writ and declaration so as clearly to set forth an action under R. L. c. 106, § 73, by the dependent next of kin of the deceased for death not preceded by conscious suffering. After a hearing, the motion was granted, the judge filing no memorandum. The defendant alleged an exception. *Held*, that on the record it must be assumed that, before allowing the amendment, the judge was satisfied that the cause of action intended by the plaintiff when the writ was issued was that set forth in the amendment; and that it could not be said as matter of law that the amendment introduced a cause of action not intended when the writ was issued.

While the giving of a sufficient statutory notice to an employer under R. L. c. 106, § 75, is a condition precedent to recovery by an employee, his administrator or his next of kin under §§ 71–73, such a notice is not to be construed with technical precision.

The purpose of the notice to an employer by an employee, his administrator or his next of kin, which by R. L. c. 106, § 75, is required as a condition precedent to recovery under §§ 71–73, is to give to the employer information as to the time, place and cause of the employee's injury, and not to advise him specifically as to its details or effects.

A notice from an employee, his administrator or his next of kin to his employer under R. L. c. 106, § 75, which contains a statement of facts which is incorrect as to a subject matter not required to be stated, is not invalidated thereby if it

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also contains a sufficient statement of the time, place and cause of the employee's injury.

After a notice has been given to an employer by the administrator of an injured employee under R. L. c. 106, § 75, which states in sufficient detail the time, place and cause of the injury to the employee, and also that the employee "received personal injuries resulting in death preceded by conscious suffering," the dependent next of kin of the employee are not precluded from bringing without a further notice an action under § 73 for death of the employee without conscious suffering.

At the trial of an action by the next of kin of one who, while in the employ of the defendant, had received injuries which resulted in his death without conscious suffering, it appeared that the injuries resulted from the fall of an elevator, upon which the employee was riding, which was caused by a defective condition due to the defendant's negligence. There was evidence that at the time of the accident there were thirteen persons in the elevator car, and that at some time previous to the accident there had been in the elevator a notice, signed by the defendant, that not more than ten persons at a time should ride thereon. There was evidence tending to show that no such notice was in the elevator at the time the employee boarded it, that there were not ten persons on board when she did so, and that the additional weight of three persons was not a contributing cause of the accident. *Held*, that a verdict for the plaintiff was warranted.

Where the evidence introduced at a trial is conflicting and the jury would find for the plaintiff if they believed the evidence relied on by the plaintiff and disbelieved that relied on by the defendant, a request to direct a verdict for the defendant must be refused.

It is proper for the judge presiding at a trial to refuse to grant a request for a ruling which deals with a particular phase or fragment of the testimony not decisive of the case.

At the trial of an action against an employer to recover for the death of an employee, it appeared that the death resulted from the fall of an elevator due to its defective condition, and that it was the duty of the employee to report to the defendant any defect in the elevator. At the time of the accident, the employee was running the elevator. The defendant requested the presiding judge to rule that, "if the elevator at the time of the accident was out of repair, the plaintiff could not recover." The request was refused. *Held*, that the request was refused properly, since it omitted the necessary element that in the exercise of reasonable prudence it would have been possible for the employee to have discovered the want of repair.

At the trial of an action against an employer to recover for the death of an employee, it appeared that the death resulted from the fall of an elevator due to its defective condition, that it was the duty of the employee to notify the defendant of any defect which might arise in the elevator, and that the employee was running the elevator at the time of the accident. The defendant requested the presiding judge to rule that, if the employee knew the defective condition of the elevator at the time of the accident, the action could not be maintained, and the request was refused. *Held*, that the request was refused properly, since such knowledge on the part of the employee would not preclude recovery unless he also appreciated the risk of running the elevator under such conditions.

It is not as matter of law want of due care on the part of the assistant superintendent of a factory while running an elevator to refuse to heed a suggestion as to how to run the elevator, made by an inferior who is not shown to have any knowledge as to elevators.

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TWO ACTIONS OF TORT to recover for the deaths of the intestates of the plaintiff, caused by the fall of an elevator and alleged to have been due to its defective condition. Writs in the Superior Court for the county of Essex dated respectively December 20 and 22, 1902.

Before the trial, which was before *Bell*, J., he allowed the amendments described in the opinion, and the defendants excepted.

At the trial, it appeared that at the time of the accident the elevator was being operated by the intestate of the plaintiff in the second case. Other evidence tended to show the following facts:

Upon one side of the elevator there was a runway in which ran a counterweight weighing eight hundred and fifty pounds. The sides of the runway, sometimes called guides, were, at a point a little above the office floor, so close together that the counterweight was likely to jam and catch in the guides. As the elevator ascended just before the time of the accident, the counterweight in descending caught at the place in the runway just above the office floor where the guides were too close together and remained there instead of going to the bottom of the runway as it ordinarily would, the elevator continuing on its journey upward. Just as the elevator arrived at the point where it stopped, another elevator which was operated by the same main belt as that which operated the elevator in question started, throwing an additional load upon the belt, causing it to run off the pulley. Crane, the intestate in the second case, reversed the shipper rope and the car immediately started downward and, not having the assistance of the counterweight and the elevator machinery, began to fall. While it was falling, the slack in the cable attached to the counterweight tightened, causing the counterweight to ascend rapidly with a jerk to the top of the building where it struck the timbers holding the sheaves which carried the hoisting cable of the elevator, breaking the cable to which the counterweight was attached. The counterweight thereupon descended along the groove of the runway until it reached the point where the guides were too close, where it left the runway and fell into the car of the elevator. At the same time, a smaller piece of the counterweight, the cable holding it having been broken by the impact, fell down the elevator well and broke through the top

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into the elevator car, killing without conscious suffering the intestates of the plaintiffs. Upon previous occasions, when there were passengers in the elevator, it had stopped at one time near the office floor and at two other times at or about the place where it stopped upon the day of the accident. There was expert testimony that the accident was caused by a defect in the condition of the runway in which the counterweight ran, the guides being in some places too narrow, thus causing the counterweight to stick in the runway and put an additional strain on the elevator of eight hundred and fifty pounds, the weight of the counterweight, that ordinary inspection would have revealed the defect, and that the number of people in the car had nothing to do with the accident. Other material facts which might have been found on the evidence are stated in the opinion.

At the close of the evidence, the defendants requested the presiding judge to rule in each case (1) that upon all the evidence the plaintiff was not entitled to recover; (2) that upon all the evidence in the case it appeared that there was a notice issued by the defendants to its employees to the effect that only ten people, including the operator of the car, should be allowed in the elevator at any one time, and also that at the time of the accident there were thirteen passengers in the car, and that this number was known to the plaintiff's intestate, and that there was, therefore, upon the part of the plaintiff's intestate disobedience of the rule which upon all the evidence in the case contributed to the cause of the fall of the elevator and the plaintiff was not entitled to recover.

In the second case, the defendants made the following additional requests for rulings:

(3) That, if it was the duty of Crane to look after the passenger elevator and to report defects therein or trouble therewith to the agent of the owners and the elevator at the time of the accident was out of repair, the plaintiff could not recover for the death of said Crane.

(4) That, if Crane knew the condition of the elevator, the action could not be maintained and the verdict should be for the defendants.

(5) That, if the elevator upon some previous occasion while

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Crane was operating it stopped and at that time he started to pull the shipper rope to cause the elevator to descend and was told not to do so and, upon the day of the accident when the elevator stopped, Crane did pull the shipper rope causing the elevator car to descend, he was guilty of negligence and the action could not be maintained.

(6) That if, after the elevator stopped upon the day of the accident, Crane by pulling the shipper rope too far caused the car to descend, he was guilty of negligence and the action could not be maintained.

The presiding judge refused the requests, and, verdicts having been returned for the plaintiffs, reported the cases for determination by this court. If the ruling was correct, judgment was to be entered on the verdicts; otherwise such order was to be made as justice might require.

W. I. Badger & W. H. Hitchcock, for the defendants.

J. P. Sweeney, for the plaintiff Herlihy.

S. Parsons, (*H. A. Bowen* with him,) for the plaintiff Crane.

RUGG, J. These two actions were brought in the name of the personal representatives respectively of Mary F. Herlihy and of Benjamin O. Crane. The declaration in the Herlihy case contained four counts, each alleging in substance that the plaintiff was the administratrix of Mary F. Herlihy and that her intestate, by reason of specified negligence, in the first count, was "mortally wounded and killed"; in the second, "was greatly injured and died in consequence thereof"; and in the third and fourth, was riding in an elevator, which fell "thereby inflicting great injury . . . on the . . . intestate, in consequence of which injury she died." The notice given under R. L. c. 106, § 75, stated that the death was preceded by conscious suffering. At the trial the plaintiff Herlihy moved to amend her writ by striking out the words indicative of her representative capacity, and by inserting, as descriptive of her, words of nearest kinship to the deceased and of dependency for support upon her wages, and to amend the declaration so as clearly to allege a cause of action under R. L. c. 106, § 73. The action thus set out after the amendment was by the dependent next of kin for the death, instantaneous or not preceded by conscious suffering, of her intestate. This amendment was allowed against the exception of

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the defendants, who contend that upon this record the court had no power to allow such an amendment. R. L. c. 173, § 48, empowers the Superior Court to allow any amendment, which will enable an action to be maintained for the cause for which it was originally intended to be brought. The court has no power to allow an amendment, which will introduce a new cause of action not intended at the time the writ was sued out. *Silver* v. *Jordan*, 139 Mass. 280. It is possible that the writ and declaration as originally framed set forth a cause of action under R. L. c. 106, § 72, for the recovery of damages for conscious suffering followed by death. But it does not unequivocally state conscious suffering, and, narrowly construed, asserts no such claim, while it does distinctly allege death as the result of the injury. At best it is doubtful on its averments whether the death was preceded by conscious suffering or not. It may be assumed that a cause of action under § 72 of R. L. c. 106 is a different cause of action from the one under § 73 of the same chapter. The notice given under R. L. c. 106, § 75, sets forth death and preceding conscious suffering, but such statements, necessarily preceding, and perhaps by a considerable time, the commencement of the action, are of slight consequence in determining the plaintiff's intent at the time of suing out the writ or drafting the declaration. The fact that the action was brought in the name of the administratrix of the deceased is some indication of an intent to proceed under § 72, but it is by no means conclusive, and amendments are often allowed to correct a mistake in this respect. *Hutchinson* v. *Tucker*, 124 Mass. 240. *Adams* v. *Weeks*, 174 Mass. 45. *Silva* v. *New England Brick Co.* 185 Mass. 151. *Drew* v. *Farnsworth*, 186 Mass. 365. The allowance of the amendment made certain which section of the statute was relied upon, and cleared up what was before doubtful upon the pleadings. Hence it cannot be said as matter of law on this record that it introduced a new cause of action. If it be suggested that something occurred outside the record, it must be assumed that the trial judge before allowing the amendment was satisfied upon what appeared before him that the cause of action intended to be brought was for the recovery of death without conscious suffering. The circumstances under which this finding was made are not reported, and hence cannot be reviewed. See R. L. c. 173,

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§ 121. St. 1908, c. 457, was enacted too recently to be applicable to this case.

In the Herlihy case it is argued that, because the notice required by the employers' liability act was given by the administratrix, and contained the statement that the deceased "received personal injuries resulting in death preceded by conscious suffering," it will not support an action for death without conscious suffering. While the giving of a sufficient statutory notice is a condition precedent to a recovery, such a notice is not to be construed with technical refinement. Especially is this true when no counter notice is given as provided in R. L. c. 106, § 75 and c. 51, § 22. A description of the injury is not required. The purpose is to give to the employer information as to its time, place and cause, not to advise him specifically as to its details or effects. *Carroll* v. *New York, New Haven & Hartford Railroad*, 182 Mass. 237. By the present notice the defendants were informed of the death as the result of the injury and of its time, place and cause. The plaintiff was not required to give any further information. Amplification, which may turn out to be incorrect, as to a subject matter not required, cannot be held to invalidate an otherwise sufficient notice.

It has not been and could not properly have been argued in either action that there was no evidence of the negligence of the defendants. There was ample testimony to support a finding of that fact.

The intestate of each plaintiff was killed by the sudden drop of an elevator, in which they were riding, and the break and fall of a counterweight connected with its operation. There was evidence tending to show that at some time previous to the day of the accident a notice had been posted in the elevator, to the effect that only ten persons could ride at one time, and there appears to have been no dispute that at the time of the accident there were thirteen people in it. The jury might have found that there was no notice in the elevator at the time of the accident, and that Miss Herlihy was in the elevator before the prohibited number was reached. There was evidence also from several experts that the added weight caused by the three persons above the permitted number did not contribute to the accident. It might have been found that the violation of the

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rule, if any was committed, was merely a condition of the accident, and not its cause, and was to be considered with all the other circumstances as bearing upon the question of the due care of the plaintiff's intestate. *McCarthy* v. *Morse*, 197 Mass. 332. It was open also for the jury to infer that there was no violation of the rule, on the ground that the notice had been removed before the accident and was no longer in force.

In the Crane case also there was a motion to amend the declaration, which was allowed against the defendants' exception. The first count in his original declaration clearly alleged instantaneous death as the ground of liability. For this reason, as well as for those heretofore stated, respecting the amendment in the Herlihy case, no error is disclosed in the allowance of the amendment.

The deceased, Benjamin O. Crane, was the assistant superintendent in the employ of the defendants, whose duty it was to see that the machinery in the factory was kept in repair, except that, with respect to the elevators, if they were out of order, it was his duty not to repair but to report to the owners of the building. There was contradictory evidence as to whether Crane knew of any defect in the elevator or of any irregularity in its working previous to the accident. Whether he did or not was therefore a question of fact. In other material aspects the evidence was conflicting. Even where it was not conflicting it was still for the jury to say how much of that which bore against the plaintiff's contention was entitled to credence. Without reviewing it in detail, it is plain that a verdict for the defendant could not have been directed. Therefore the first request for ruling was properly refused.

As to the several other specific requests for rulings made by the defendants, it is perhaps enough to say that they dealt with particular phases or fragments of the testimony, which were not decisive of the case. It was not the duty of the trial judge to discuss each of these severally, and instruct the jury upon them. It appears that the case was submitted to the jury under general instructions which were not excepted to. Hence the defendants do not appear to have suffered harm. But if the requests are examined in detail, no error appears in the refusals to grant them. The third request was refused properly, because it omits

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the necessary element, that in the exercise of reasonable prudence it would have been possible for the deceased to have discovered the defect which actually resulted in the injury. The fourth could not have been given because mere knowledge of the condition of the elevator was not sufficient to preclude recovery. There also must have been an appreciation of the risk of its use. The fifth and sixth requests did not correctly state the law as applicable to the evidence. The only evidence that it was dangerous so to pull the shipper as to cause the elevator to descend, when it stuck, came from a foreman in the employ of the defendants, who said he had a general knowledge about machinery but was not an expert, who was not shown on the testimony to have possessed any knowledge as to elevators, and who was the inferior of Crane in position. He testified that he once told Crane not to start the elevator downward when it stuck. It is not, as matter of law, want of due care to refuse to heed the suggestion of one who knows nothing about the subject respecting which he undertakes to direct, unless there is a duty of obedience. Although experts upon elevators were witnesses, it does not appear that they were asked what might naturally have been expected to be the result of pulling the shipper as the plaintiff's intestate did under the then known conditions. In the absence of evidence, it cannot be said to have been so plainly a careless act as matter of common knowledge as to warrant an instruction to that effect.

What has been said respecting the notice in the elevator restricting the number of passengers to ten applies with almost equal force to the Crane case. It is not clear that the notice was in the car at the time of the accident, nor how long before it had been removed, nor could it be said to be certain upon the evidence that the accident resulted from the overloading of the elevator.

Judgment on the verdict in each case.

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WILLIAM D. MARVEL *vs.* JOHN W. COBB.

Bristol. October 27, 1908. — November 28, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To compel reconveyance of land obtained by fraud, Laches. *Fraud. Real Action.*

A bill in equity alleged that the defendant by deceit and fraud induced the plaintiff's father to execute and deliver to him in April, 1890, a conveyance of certain real estate and a mortgage of certain other real estate, that the plaintiff's father died intestate in October, 1890, and that a brother of the plaintiff was appointed administrator of his estate, that thereafter in 1891 the mortgaged property was advertised for sale by the defendant for breach of condition in the mortgage, that the plaintiff attended the sale and protested against it, declaring the mortgage to be fraudulent and to have been obtained by false pretenses by the defendant, that, after one adjournment of the sale, the mortgaged property was sold to one R., "the subservient tool and confidential agent of the defendant" for $3,000 after the plaintiff and the administrator of the estate of the father had bid $6,000, and was immediately conveyed by R. to the defendant. It also was alleged that the plaintiff was absent from this State from 1891 until the middle of 1902, that he was advised repeatedly by the administrator that his counsel and the defendant's counsel were negotiating and in progress of effecting a settlement, that the two counsel "were, tacitly if not actually, in harmony to postpone and prevent any settlement"; that many portions of the land had been sold to persons who were not parties to the suit, and that in 1903 the plaintiff had obtained an assignment from the administrator of the right to bring the suit. The bill contained no offer to pay what might be found to be equitably due to the defendant from the estate of the plaintiff's father. It was filed in October, 1906, and, except as above stated, contained no excuse for delay. The defendant demurred. *Held*, that the demurrer should be sustained because of laches of the plaintiff, because of lack of necessary parties, and because of lack of an offer of the plaintiff to pay to the defendant upon a reconveyance what might equitably be due him.

Where the owner of certain land executed and delivered a mortgage of it and died intestate, and the mortgagee made a fraudulent alteration in the mortgage deed so that land not included in the deed as originally executed was included in the description in the deed as altered, and the land as described in the altered deed was sold at a foreclosure sale to a stranger who entered into possession of it, an heir of the mortgagor should enforce his right in the land so sold by writ of entry and not by a bill in equity.

BILL IN EQUITY, filed in the Superior Court for the county of Bristol on October 20, 1906, and amended on July 6 and December 26, 1907, praying that the defendant "be ejected from and execute a full and complete surrender" of property described

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in the opinion, for an accounting, for damages and for an attachment.

The bill as amended occupied twenty pages of the printed record.*

The defendant demurred. The demurrer was heard by *Schofield*, J., who filed the following memorandum:

"This case comes up on demurrer filed February 6, 1908, to the plaintiff's bill as finally amended. The causes of action relied upon in the bill arose in 1890 and 1891. The plaintiff in 1891, according to allegations in the thirteenth paragraph of the bill, had knowledge of facts sufficient to justify him in beginning proceedings against the defendant to set aside the deed of the Pocasset property and the mortgage of the Patuisset property from Dexter Marvel to the defendant, and the foreclosure sale under the mortgage. As an heir at law of Dexter Marvel he had a right to begin such proceedings without waiting for the settlement of the estate of Dexter Marvel in the Probate Court. This bill of complaint was filed October 20, 1906. It contains no allegations of fact sufficient to excuse the long delay of the plaintiff, and upon the face of the bill he is guilty of laches. The plaintiff has conducted the case in person and shown ability and zeal in presenting the various points to the court. It is assumed that no further amendment to the bill is desired, and therefore the order to be entered upon the demurrer is, 'Demurrer sustained, and bill ordered to be dismissed.'"

The bill accordingly was dismissed, and the plaintiff appealed.

W. D. Marvel, pro se.

A. Fuller & W. J. Davison for the defendant, submitted a brief.

LORING, J. The bill in this suit is multifarious and argumentative. In addition, while it charges the defendant with fraud, cheating and forgery, it is almost entirely lacking in stating facts justifying those charges.

So far as a statement of what is thus charged can be made it is in substance as follows:

The plaintiff is the son but not the only heir of his father, Dexter Marvel, a citizen of Massachusetts, who died intestate at Lynn, in Essex County, on October 28, 1890.

* Throughout the proceedings the plaintiff, who was not a lawyer, acted for himself.

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In April, 1890, and before, Dexter Marvel was the owner of two large tracts of land in the town of Bourne, Barnstable County, laid out in lots for summer cottages, and known as Pocasset Heights and Patuisset property, respectively. These two tracts of land were subject to a mortgage held by the Bristol County Savings Bank, in the sum of $6,000.

In April, 1890, the defendant, at the request of the plaintiff's father, advanced the money necessary to take up this mortgage. The plaintiff's father conveyed to the defendant the Pocasset Heights and mortgaged to him the Patuisset property. In payment for the Pocasset Heights the plaintiff's father received from the defendant one hundred and five shares of the Cobb Stove and Machine Company. As security for the money advanced by the defendant to take up the prior mortgage for $6,000 on both properties, the defendant received from the plaintiff's father, in addition to the mortgage on the Patuisset property, the one hundred and five shares received as the purchase price of the Pocasset Heights property.

There is a long statement of false reports as to the condition and make up of the stove company, but there are no allegations connecting that statement with the transactions between the plaintiff's father and the defendant. It is stated however that this transaction throughout was a fraudulent one on the defendant's part. It is also alleged that at the time of this transaction the plaintiff's father was ill and "unable to properly attend to his affairs."

For the breach of some condition in the mortgage to him of the Patuisset property the defendant advertised that property for sale on August 10, 1891. The plaintiff went to Pocasset and saw Cobb on August 8, 1891, and proposed that the mortgage of the Patuisset property and the deed of the Pocasset Heights property should be cancelled and the shares in the stove company returned and the amount due the defendant determined by arbitration. This the defendant refused to do. Thereupon the plaintiff notified the defendant "that the pretended or so-called mortgage was fraudulent," that he should "denounce the mortgage as a fraud and forbid the sale." He also notified the defendant that the proposed mortgage sale had not been properly advertised. In consequence of the latter no-

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tice the sale was adjourned until August 17, 1891. At the auction sale on that day the plaintiff and the administrator of his father's estate were present. The plaintiff "under advice of counsel . . . then and there made protest forbidding the sale and declared the so-called mortgage to be not only fraudulent but obtained by said Cobb under false pretenses." In spite of the protest the auctioneer proceeded with the sale. The administrator and the plaintiff each made a bid of $6,000, interest and expenses, but the property was declared sold to one E. M. Reed for $3,000. It had been alleged in an earlier paragraph of the bill that E. M. Reed was "the subservient tool and confidential agent of" the defendant. It is further alleged in the bill that immediately after the foreclosure sale Reed conveyed the Patuisset property bought in by him at the sale to the defendant.

It is also alleged in the bill of complaint that the plaintiff's father's estate "was technically bankrupt"; that he was the largest creditor of it and that it was agreed between the plaintiff and "his co-heirs" that all outside debts should be paid and the residue then left should be assigned to the plaintiff. Apparently pursuant to that agreement the administrator, on August 19, 1902, assigned to the plaintiff all personal property and rights of action then vested in him.

The bill was sworn to on October 18, and filed on October 20, 1906. That is to say, sixteen years and six months after the deed and mortgage which it is now sought to set aside for fraud were made, — sixteen years after the death of the father and fifteen years and two months after the foreclosure sale which the plaintiff now seeks to have set aside.

If it is assumed that the plaintiff's father was induced by false and fraudulent representations of the defendant (first) to convey to him the Pocasset Heights for one hundred and five shares of the Stove Company, and (second) to mortgage the Patuisset property to him, he had a right to set aside that conveyance and that mortgage on returning the one hundred and five shares and the money lent to him on executing the mortgage, or he could have brought an action for damages based upon the fraud and deceit. These rights of action passed to and were vested in the administrator of his estate. The action for fraud and deceit being an action of tort, was barred by force

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of R. L. c. 202, §§ 2, 10, at the end of six years, that is to say, in 1896, and the plaintiff can get no better standing by bringing this suit in equity. *Ela* v. *Ela*, 158 Mass. 54. The right to avoid the sale and the loan was barred at the same time. *Dodge* v. *Essex Ins. Co.* 12 Gray, 65. The plaintiff has not alleged any fact bringing the administrator of his father's estate within the disabilities prescribed by statute by reason of which a longer time is given a plaintiff in which to bring his action. These causes of action therefore were barred when the administrator assigned them to the plaintiff in 1903. Of course the plaintiff has no greater rights than his assignor (the administrator) had.

The other cause of action to be gathered from the statements made in the bill of complaint is the right to set aside the foreclosure sale of the Patuisset property on the ground that the administrator and the plaintiff bid more than the $3,000 for which it was sold to Reed.

The plaintiff's father died seised of the equity of redemption in the Patuisset property, and upon the allegations of this bill (which are taken to be true for the purpose of disposing of the defendant's demurrer) with a right to avoid that mortgage for fraud. The equity of redemption descended to his heirs, including the plaintiff among others.

So far as this cause of action is concerned, the bill is fatally defective for want of an offer to pay what is now equitably due on the mortgage, and because it is alleged that many sales of the Patuisset land have been made to many persons, and that all the remaining estate was conveyed to one Stone with intent to defraud the plaintiff. In a suit to which Stone is not a party the foreclosure of the land cannot be set aside. But apart from the lack of an offer to redeem, and apart from the fact that the land not sold to third persons now stands in the name of Stone, if it be assumed that the plaintiff is ready to pay the whole mortgage debt for the land not sold to third persons (since the grantees of the land sold have not been made parties), the plaintiff is barred by his own laches.

The right to avoid a foreclosure sale which is voidable must be exercised within a reasonable time, even if the mortgaged land is still held by the purchaser at the foreclosure sale. *Learned* v. *Foster*, 117 Mass. 365. *Fennyery* v. *Ransom*, 170

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Mass. 303. *Tetrault* v. *Fournier*, 187 Mass. 58. In the absence of sufficient excuse, fifteen years and two months is more than a reasonable time. See *Learned* v. *Foster*, *Tetrault* v. *Fournier*, *ubi supra.*

The first excuse alleged by the plaintiff is that he was absent from the State from 1891 until "the middle of the year 1902." That is no excuse to one who does not set up ignorance of the cause of action at any time. See *Wells* v. *Child*, 12 Allen, 330; *Naddo* v. *Bardon*, 2 C. C. A. 335. The plaintiff was present at the foreclosure sale, and does not plead ignorance.

His next excuse is that he "was repeatedly and frequently advised by the said administrator that his counsel and the counsel for the said John W. Cobb were negotiating and in progress for a settlement; that said counsel for said administrator and said E. M. Reed counsel for said Cobb were friends of intimate professional and personal relations and associations. Such condition of things continued without result, and, as complainant is informed and believes, and upon such avers, that with the knowledge of and at the behest of said John W. Cobb, said counsel for said administrator and said counsel for said Cobb were, tacitly if not actually, in harmony to postpone and prevent any settlement, and such has been the result." If it be assumed that the counsel for the administrator was acting as counsel for the plaintiff, his inaction is no excuse in the absence of instructions by the plaintiff that he was ready to redeem.

His next excuse is that until he obtained the assignment from the administrator he could not bring this bill, and that it was not until 1903 that he succeeded in getting that assignment. That is not so. His right to redeem belongs to him as one of the heirs to whom the land descended subject to the mortgage.

There is one allegation which remains to be considered. It is that contained in paragraph numbered seven, succeeding paragraph numbered twenty-three. It is there in substance alleged (as we understand it) that "when the said ('original') documents were produced in court," the plaintiff "discovered" that a fraudulent alteration had been made in the mortgage of the Patuisset property which rendered that mortgage void. The alteration consisted in the erasure of the numbers 327 and 328 in the enumeration of lots originally contained in the Patuisset

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property previously sold, and therefore not included in the mortgage. As to this the amended bill contains this statement: "Complainant has since the commencement of this action obtained knowledge of and now asserts his charges as a fact that at the time of obtaining said so-called mortgage and said so-called deed, collateral thereto (being all one inseparable transaction) by fraud, trickery, deceit and overreaching, the defendant John W. Cobb with malicious intent and in aggravation of his fraudulent practices in obtaining the said so-called mortgage and so-called deed made or procured to be made fraudulently and with felonious intent of effectually defrauding said Dexter Marvel, certain erasures (forgeries) in said so-called mortgage." It may be doubted whether this amendment to the bill is to be construed on the whole to state anything more than the fact that an erasure appeared on the face of the original mortgage when it was produced in court. But assuming in favor of the plaintiff that this is not so and that this amendment is an allegation that the mortgage was rendered void by a fraudulent alteration made by the defendant, since the plaintiff is not in possession, his remedy is a writ of entry. See for example *First Baptist Church of Sharon* v. *Harper*, 191 Mass. 196.

Decree affirmed.

HARRY W. GALLIGAN *vs.* EDWARD McDONALD & others.

Bristol. October 26, 1908. — November 30, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Devise and Legacy, What estate. *Equity Jurisdiction*, Specific performance. *Words*, "Remaining."

A son made an agreement in writing to convey in fee simple certain real estate, the title to which he claimed under the following provisions in his father's will: "I devise to my son all the real estate of which I may die possessed and he shall hold the same to him and to his heirs forever, provided however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then and in either of such cases, my will is that my brother and my sister shall have and take all my real estate remaining at the death of my son, share and share alike, to them and to their heirs forever." The testator died seised of several distinct parcels of land. The person to whom the son had agreed to convey the real estate refused to receive a deed, contending that

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the son could not convey a title in fee simple. The son thereupon brought a bill in equity to enforce specific performance of the agreement. *Held*, following *Kelley* v. *Meins*, 135 Mass. 231, and *Ide* v. *Ide*, 5 Mass. 500, that by the words "all my real estate remaining at the death of my son" was meant such property as the son should not have disposed of during his life, that the son took an estate in fee simple, that the attempted limitation over was void, and therefore that the bill might be maintained.

BILL IN EQUITY, filed in the Superior Court for the county of Bristol on April 27, 1908, seeking specific performance of an agreement in writing whereby the plaintiff agreed to sell and convey to the defendants and the defendants agreed to receive a conveyance of and to pay for certain real estate.

The case was heard on the bill and answers by *White*, J., who reserved it for determination by this court. The facts are stated in the opinion.

The case was submitted on briefs.

A. M. Alger, for the plaintiff.

J. B. Tracy, for the defendant McDonald.

R. P. Coughlin, for the defendants Galligan.

MORTON, J. This case comes here on a reservation and report by a judge of the Superior Court on the bill and answers. The question at issue relates to the construction of the fifth clause of the will of one Edward A. Galligan of Taunton. The clause is as follows: "Fifth. I devise to my son Harry W. Galligan, all the real estate of which I may die possessed and he shall hold the same to him and to his heirs forever, provided however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then and in either of such cases, my will is that my brother James H. Galligan and my sister Ann Galligan shall have and take all my real estate remaining at the death of my son, share and share alike, to them and to their heirs forever." In addition to the averments contained in the bill and admitted by the answers, it is agreed that the testator died seised of several distinct parcels of land with the buildings thereon including the one which is the subject of this suit.

The plaintiff contends that the word "remaining" is not to be construed in the technical sense of a remainder, but as meaning such part of the real estate devised to him as shall not have been disposed of by him at his death; that the limitation over must

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take effect, if at all, as an executory devise; that it cannot take effect as such because an absolute power of disposal is impliedly given him, and the limitation over is, therefore, void, and he takes an estate in fee simple absolute. The defendants contend that the proviso applies to all of the real estate devised to the plaintiff; that the effect of the devise is to vest in the plaintiff a qualified fee determinable upon the contingency of his dying without issue surviving him, or upon the death of such issue, if any, during minority; and that the limitation over is, therefore, a valid executory devise. It is manifest that, according as the plaintiff's or defendants' contention is sustained, the plaintiff can or cannot give "a good and clear title," as he has agreed to do, to the real estate in question.

We are unable to distinguish this case from *Kelley* v. *Meins*, 135 Mass. 231, and *Ide* v. *Ide*, 5 Mass. 500. In *Kelley* v. *Meins* there was first a devise to the son by the testatrix of all of her estate real and personal, "To have and to hold the same to him . . . his heirs, executors, administrators and assigns, forever." Then it was provided by a second codicil that the son should not come into possession till he reached the age of twenty-five, and by the first codicil that if he "shall die without leaving living issue, then any portion of my said estate and property which may remain shall be equally divided among my sisters and nieces and their female heirs and assigns." The son arrived at the age of twenty-five and died shortly after, intestate and without issue, and the trustee under the mother's will having in the mean time conveyed to him certain real estate which had come to him by the foreclosure of a mortgage and which the court treated as if the testatrix had been seised of it at her death. Thereupon the sisters and nieces of the testatrix brought a writ of entry against the heirs at law of the son to recover the premises which had been thus conveyed by the trustee to him. It was held that by the portion which should remain was meant the portion which should remain at the death of the son, and that the construction to be given to the will and the first codicil was that the son should have during his life the absolute power of disposition of all the property given to him; that this power of disposal was inconsistent with an executory devise, and that the limitation over was, therefore, void.

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In *Ide* v. *Ide*, *ubi supra*, the devise was to a son and "his heirs and assigns forever" with a limitation over if the son should die and leave no lawful heirs of "what estate he shall leave, to be equally divided between my son J. and my grandson N. to them and their heirs forever." It was held that the limitation over was only of such estate as the son should leave at his death; that by necessary implication the testator intended that the son should have the power to dispose of any or all of the estate devised; and that that was inconsistent with the limitation over and the limitation was, therefore, void and the son took an absolute estate. See also *Richardson* v. *Noyes*, 2 Mass. 56; *Gifford* v. *Choate*, 100 Mass. 343; *Damrell* v. *Hartt*, 137 Mass. 218; *Joslin* v. *Rhoades*, 150 Mass. 301; *Knight* v. *Knight*, 162 Mass. 460; *Bassett* v. *Nickerson*, 184 Mass. 169.

"In the case at bar there is" as was said in *Ide* v. *Ide*, *supra*, "first an express fee simple devised" to the son, the plaintiff. This would give the plaintiff the absolute right to dispose of the property devised to him if it stood alone. Then follows the provision relied on by the defendant, "that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then and in either of such cases, my will is that my brother James H. Galligan and my sister Ann Galligan shall have and take all my real estate remaining at the death of my son," etc. By "estate remaining at the death" of the son is meant estate that shall not have been disposed of by the son during his life. It is upon such estate, if any, that the proviso is to take effect, and not upon all of the real estate devised. By necessary implication the son is to have the power to dispose of any or all of the estate devised to him. Such a power is inconsistent with an executory devise and the limitation over cannot therefore take effect as an executory devise.

Neither do we think that the effect of the limitation over is to cut down the son's estate to a life estate pure and simple, or to a life estate with a power of disposal, though the latter construction would not help the defendant. *Damrell* v. *Hartt*, *supra*. *Hale* v. *Marsh*, 100 Mass. 468. *Lyon* v. *Marsh*, 116 Mass. 232.

If by "estate remaining" were meant a remainder, in the technical sense of the word, applicable to all of the real estate devised to the son, then the limitation over could and should

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take effect as an executory devise contingent upon the son's dying without issue or the issue dying during minority, and the son would take a qualified fee determinable on the happening of either one of those events; or, taking the whole devise together, perhaps it might be construed in such case as vesting in the son an estate for life with remainder to the brother and sister. *Whitcomb* v. *Taylor*, 122 Mass. 243. *Schmaunz* v. *Göss*, 132 Mass. 141. *Hooper* v. *Bradbury*, 133 Mass. 303. *Welch* v. *Brimmer*, 169 Mass. 204. But as already observed we think that by "estate remaining" is meant what the son shall not have disposed of during his life, and not a remainder in the technical sense of that word.

The only objection that is made to the maintenance of the bill is that the plaintiff cannot give a good and clear title as he has agreed to do and that the defendant cannot and should not therefore be compelled to specifically perform the contract. For reasons stated above we are of opinion that the plaintiff can give "a good and clear title," and it follows that he is entitled to a decree in his favor.

Decree for the plaintiff.

DANIEL D. SULLIVAN *vs.* OLD COLONY STREET RAILWAY.

Bristol. October 27, 1908. — November 30, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street Railway. *Carrier. Damages.*

The mere fact that an electric car becomes derailed because of negligence on the part of the street railway company operating it does not give to a passenger thereon a right of recovery in tort against the company, unless he suffered damage therefrom.

Where, at the trial of an action of tort against a street railway company for damages alleged to have been received by a passenger by reason of the derailment of the car upon which he was riding, it is admitted by the defendant that the derailment was caused by its negligence and the plaintiff introduces evidence of damage resulting to him, nevertheless a verdict should not be directed for the plaintiff, since the jury are not bound to believe the evidence of the plaintiff as to damages.

Where an electric car is derailed by reason of negligence on the part of the operating company, and a passenger thereon is thereby prevented from reaching his

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destination, the company is not necessarily liable for all of the consequences of the defendant's failure to transport the passenger to his destination, since it would not be liable for such of the consequences as could have been avoided by the plaintiff's conducting himself as a reasonable man would have done under the circumstances.

The intention of one boarding an electric street car, to be transported through several towns to a city, which is not communicated to the company operating the car, the passenger paying a fare in each town, does not place the company under obligation to transport the passenger to his intended destination.

At the trial of an action of tort against a street railway company by a passenger to recover for damages alleged to have been suffered by the plaintiff by reason of the derailment of the car upon which he was riding, the plaintiff alleged and introduced evidence tending to show that he waited three hours in the night while the car was being put back upon the track and, in consequence thereof, missed a car which would have taken him to his destination and was compelled to sleep in a car barn over night. Evidence introduced by the defendant tended to show that, shortly after the car left the track, an announcement was made near to the plaintiff by an employee of the defendant in a loud voice that the passengers by walking about a mile could reach another car which would seasonably take them to the destination which was the plaintiff's, but that the plaintiff did not adopt the suggestion. The plaintiff testified that he did not hear the announcement. The derailment of the car was admitted to be due to negligence of the defendant, but the question of the defendant's liability was left to the jury under instructions to the effect that, if they should find that the defendant as it contended properly notified the plaintiff and the other passengers and that the damages suffered by the plaintiff were due to his failure to conduct himself as a reasonable man should have under the circumstances, their verdict should be for the defendant. The jury found for the defendant. *Held*, that the charge was proper and that the finding of the jury was warranted.

TORT. The first count in the declaration alleged that while the plaintiff was a passenger on an electric car of the defendant marked "Newport," the car was derailed at Tiverton owing to the defendant's negligence "whereby the plaintiff was jolted and in many ways injured externally and internally." The second count alleged that the plaintiff, intending to go to Newport, took at Fall River a car of the defendant's marked "Newport" at 9.50 P. M. on August 3, 1905; that, through the defendant's negligence, the car was derailed at Tiverton, where the plaintiff "was obliged to wait three hours for the car to be put back on the rails"; that at Stone Bridge the defendant ferried the plaintiff across to the connecting car which was to carry him to Newport; that there the plaintiff was directed to board a car, which was marked "Newport," and which was waiting for the passengers who were to be carried further to their destination; that at Library Corner in Portsmouth the

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car stopped and all passengers were told by the defendant to leave the car and that it was the end of the route; that the plaintiff got off believing he was near Newport and that when he discovered he was nine miles from Newport he walked back to the car barn for a distance of over two miles where he sought refuge for the night in one of the defendant's box cars; that the plaintiff was so exhausted that he stumbled as he tried to enter the box car and cut his legs and that in the morning the plaintiff was carried to Newport; that the defendant "did not perform the duty which it had undertaken as a common carrier and in consequence of which the plaintiff's nervous system was wrecked and his constitution broken down and he has been and now is under medical care and was and now is unable to attend to his business for all of which he seeks damage." *

At the trial in the Superior Court before *Dana*, J., the only witness for the plaintiff who testified as to the circumstances of the accident was the plaintiff himself. His testimony was substantially to the same effect as the allegations in the declaration. As to the derailment, he testified that it was violent and that he was much thrown about. He also stated that the night was foggy, misty and rainy, and that, while waiting three hours for the car to be put back on the track, he sat on an embankment at the side of the road. He stated that he did not hear any announcement made to the effect that, if the passengers for Newport would walk to the ferry they would be ferried over to the last car going to Newport that night.

The evidence for the defendant tended to show that there was practically no jar when the car left the rails at Tiverton, that, a short time after the accident, one of the defendant's employees announced in a loud voice that all passengers intending to go through to Newport should walk down to the ferry and go across to the car on the other side, which was the last car through, and that the car on the other side would wait; that after the announcement all the passengers whom the employee who made it saw left for the ferry; and that the embankment

* The declaration was in three counts, the first two as described above, and the third in contract. At the trial the plaintiff elected to proceed on the first two counts, and waived the third.

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on which the plaintiff sat when the announcement was made was about twelve feet from the car.

Other facts are stated in the opinion.

At the close of the evidence, the plaintiff asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is entitled to recover on the first count.

"2. Upon all the evidence the plaintiff is entitled to recover on the second count.

"3. If the jury shall find that the plaintiff, when he boarded the car at Fall River, intended to be taken to Newport, and if the car that he boarded was bound for Newport, then the plaintiff is entitled to recover for all of the proximate consequences of the defendant's bringing the plaintiff only as far as Library Corner.

"4. If the jury shall find that the plaintiff, when he boarded the car at Fall River, intended to be taken to Newport and that the car that he boarded was bound for Newport, then it was the duty of the defendant to bring him to Newport and the failure to do so will make the defendant liable for all the direct consequences of such failure unless the defendant made known to the plaintiff that this car would not go to Newport and provided another means of arriving at Newport which was reasonably accessible to the plaintiff. A general announcement to the passengers is not enough unless it was heard by the plaintiff or unless the announcement was made in such a manner and under such circumstances that it could be reasonably said to have been heard by the plaintiff.

"5. If the jury shall find that an announcement was made that another car was waiting one mile away and that at the time of such announcement the plaintiff was sitting on the bank, then such announcement, if general, to all the passengers made once would not save the defendant unless that announcement was heard by the plaintiff."

The judge refused to make any of these rulings.

In the course of his charge the judge instructed the jury as follows:

"The only matters, then, of damages for you to consider are these: First, what was the effect upon the plaintiff of the jolts when the car was derailed? To what extent did they injure the

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plaintiff? And, secondly, how far was the plaintiff injured, if injured at all, by his exposure while waiting three hours for the car? Of course, if you find that there was no necessity for his waiting that amount of time, and as a reasonable man he should not have waited that amount of time, why, he would not be entitled to recover for any consequence that may have followed from that exposure; but if, on the other hand, there was nothing said to him about going down to the ferry and taking this other car, and nothing of all that that has been testified to by the defendant took place there, why, that presents another question; but the real thing to determine on the facts as you find them in the case as to this particular point, is, Did the plaintiff act as a reasonable man would act under the conditions as they then and there existed by remaining there three hours?

"Then the other injury for which the plaintiff might make a claim and concerning which you are to find a verdict is the injury incurred by exposure in the car barn. . . . If the plaintiff acted as a reasonable man would act, having the information that you find him to have had and his presence in the barn there was necessitated under all the circumstances of the case, and as a reasonable man acting reasonably he could not well have avoided being in the barn and staying there the whole night, why, then you can consider such exposure as he underwent there in the estimation of damages; otherwise you cannot; and you could not permit him to recover for any damage that may have been occasioned by his stepping into the car. Under our rules of law that damage would be too remote, and, within the decisions, could not be held by you to be attributable to the accident."

The plaintiff excepted to the whole charge. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

D. R. Radovsky, for the plaintiff.

J. M. Swift, for the defendant.

SHELDON, J. No question was made at the trial but that the defendant was liable for any injury done to the plaintiff by reason of its car having left the track. But if no injury was caused by this to the plaintiff, if he suffered no damage whatever from the defendant's negligence, then he would not be entitled

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to recover. Although there has been negligence in the performance of a legal duty, yet it is only those who have suffered damage therefrom that may maintain an action therefor. *Heaven* v. *Pender*, 11 Q. B. D. 503, 507. *Farrell* v. *Waterbury Horse Railroad*, 60 Conn. 239, 246. *Salmon* v. *Delaware, Lackawanna & Western Railroad*, 19 Vroom, 5, 11. 2 Cooley on Torts, (3d ed.) 791. Wharton on Negligence, (2d ed.) § 3. In cases of negligence, there is no such invasion of rights as to entitle a plaintiff to recover at least nominal damages, as in *Hooten* v. *Barnard*, 137 Mass. 36, and *McAneany* v. *Jewett*, 10 Allen, 151. Accordingly, the first and second of the plaintiff's requests for rulings could not have been given, and the rulings made were all that the plaintiff was entitled to.

The other rulings asked for could not have been given in the form in which they were expressed, because the third stated the rule of damages too broadly, so that the defendant would have been held for damages resulting from the plaintiff's own acts; the fourth was open to the same objection, and made the right of the plaintiff to be carried through to Newport depend merely upon his unexpressed intention, regardless of whether it had been communicated in any way to the defendant, and whether the defendant had undertaken to carry him to Newport or not; and the fifth made the plaintiff's rights depend solely upon his having heard the announcement made by the defendant's servant, without regard to the question whether it was seasonably and properly made. It was a question of fact for the jury whether under the circumstances the defendant had given sufficient notice of what was to be done in the existing emergency. The questions involved in these requests were fully covered by what was said to the jury. It could not have been ruled that there was an absolute and unqualified obligation upon the defendant, either by agreement with the plaintiff or as a duty arising from the circumstances, to carry him to Newport. He had procured no ticket, he had paid no fare to that place. A separate fare was to be paid in each town upon the route as it was passed through; and he seems to have been carried as far as he had paid or offered to pay his fare. The attention of the jury was carefully directed to the question whether the defendant had properly notified the plaintiff and the other

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passengers that those who wished to go to Newport should walk to the ferry, and there take the last through car, which would wait for them; and under the instructions the jury must have settled this question in the defendant's favor, and have found that the plaintiff's exposure and subsequent failure to reach Newport were due to his own acts and to his own failure to conduct himself as a reasonable man should have done, rather than to any fault of the defendant. This makes it unnecessary to determine whether the judge went too far in saying that the jury could not find that there was a contract to carry the plaintiff from Fall River to Newport. And the ruling that he could not recover for the walk from Library Corner was assented to by his counsel, and has not been specifically complained of.

There was no error in what was said by the judge as to the measure of damages. It was the duty of the plaintiff, not only to do nothing to aggravate the results of the accident, but to use all reasonable care to lessen the injurious effects of what had happened. *Ingraham* v. *Pullman Co.* 190 Mass. 33. *French* v. *Vining*, 102 Mass. 132, 137. *Sherman* v. *Fall River Iron Works*, 2 Allen, 524, 526. *Loker* v. *Damon*, 17 Pick. 284. This was in substance the ruling made.

The plaintiff's misfortune seems to have been that the jury failed to believe much of his testimony; but this they had the right to do, even where it was uncontradicted. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. *Commonwealth* v. *McNeese*, 156 Mass. 231.

Exceptions overruled.

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GEORGE R. JEWETT, trustee, *vs.* GEORGE R. JEWETT, executor, & others.

Essex. November 4, 1908. — November 25, 1908.*

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Devise and Legacy. Words, "Heirs."

A testatrix died, leaving a son and two daughters. By her will she gave to her son one fourth of all the residue of her estate. The other three fourths she gave to trustees, with provisions that the income should be paid primarily to her daughters, but in certain events in part to her son and in part to the descendants, if any, of her daughters. The will then provided that the trustees "on the decease of the last survivor of my said daughters" shall "convey, assign, deliver and distribute the whole remaining trust property to the then surviving descendants of my said children respectively, . . . and in case of there then being no surviving descendents of any of my said children, then the trust property is to go to my heirs and in either case the trust is to cease." All of the three children of the testatrix died without issue. Upon the death of the last survivor of them, who was one of the daughters, the trustees brought a bill for instructions as to whether the persons designated as the "heirs" of the testatrix, among whom it was their duty to distribute the property, were her three children, who were her heirs at the time of her death, or were certain collateral kindred of the testatrix, who would have been her heirs had she died at the time of the death of the last survivor of her children. *Held*, that the will contained no manifestation of an intent to designate by the word "heirs" any other persons than those who were the heirs of the testatrix at the time of her death; that the facts, that her heirs at the time of her death were her children, that an absolute bequest was made to her son, and that life interests were given to her daughters, did not indicate an intention that these same children should not take finally as her heirs after the termination of the limitations made by her will.

In interpreting the will of a testatrix, who was a widow, the fact that her husband by his will expressly gave to the survivor of his children the power to dispose of such survivor's interest in the remainder of the estate, the fact, which might be inferred, that tne testatrix was acquainted with the contents of her husband's will, and the fact that she did not make a similar provision, do not show an intention of the testatrix that her children should not have the power to dispose of their respective interests in the remainder of her estate.

In interpreting the will of a testatrix, a careful provision in the will, that the shares of the income of a trust fund which were to be paid to her daughters or to their female descendants should be paid to them independently of their

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* The opinion in this case was withdrawn on an application for a rehearing. This was denied on January 4, 1909, when the case was returned to the Reporter.

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husbands, does not warrant the inference that the testatrix wished to deprive her daughters of any interests in remainder lest they should exercise their unrestricted power of disposition by bequeathing such interests to their husbands.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 12, 1908, by George R. Jewett, trustee under the will of Elizabeth Howes, late of Salem, for instructions.

The case came on to be heard before *Rugg*, J., who, at the request of the parties, reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

The will of Elizabeth Howes was dated January 10, 1854, and, omitting the attesting clauses and the signatures of the testatrix and the witnesses, was as follows:

"I, Elizabeth Howes, wife of Frederick Howes of Boston, make my will hereby as follows:

"First. I give, devise and bequeath to my son William Burley Howes, one fourth part of all the property, or legal or equitable interest in property real and personal which I may be seized of, possess, have or be entitled to, in my right at the time of my decease whether immediately or in remainder or reversion or which I have or hereafter may have a right or authority to devise, bequeath or dispose of by will or by testamentary appointment in the nature of a will to have and to hold to him and his heirs and assigns. This devise and that of the other three quarters hereinafter made for my daughters are to be subject to the provisions subsequently made herein respecting the annuity to my brother Edward Burley and also respecting Abigail Waugh and Nancy Abbott.

"Second. I give, devise and bequeath the other three quarters of my property as the same is specified above to my said son, William Burley Howes, and to my son-in-law Joseph Sebastian Cabot, Esquire, to have and to hold to them and their heirs and assigns and their legally appointed substitutes and successors, and to the survivor of them or to either of them if one only shall accept the trust and his legally appointed substitutes and successors and his and their heirs and assigns, respectively, in trust for the uses and purposes hereinafterwards expressed, viz:

"Firstly. In trust to hold, manage, lease, sell, mortgage, assign and dispose of said property, and receive the rents, in-

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terest and income thereof, and of the proceeds thereof for the purposes herein provided, and to invest and reinvest the proceeds thereof from time to time as they or the survivor of them or the trustee or trustees from time to time legally appointed in their stead may deem safe and advantageous, and best calculated to promote the objects of the provisions of this will.

"Secondly. In trust to pay over one-third part of the net rents, interest and income of said property at convenient times semi-annually or quarterly to each of my daughters, Susan Burley Cabot, wife of said Joseph Sebastian Cabot, Elizabeth Howes and Lucy Cabot Howes, during the life of each of my said daughters, respectively, on the order or receipt of each made at the time of any such payment, independently of any husband either of them may have at the time, or to apply and expend a third part of said net rents, interest and income for the separate use and benefit of my said daughters respectively, independently of their husband, if any, at the time of any such payments and expenditures of such rents, interest and income, the said rents, interest and income not to be subject in any respect to the control, contracts, debt or liabilities of any such husbands.

"Thirdly. In trust on the decease of either of my said daughters to pay over one-third of such rents, interest and income to her descendants, if any, that shall be surviving from time during the continuance of said trust in the same proportions in which they would be entitled to share in a distribution of the personal estate of such daughter, at the time of any such payment, being a widow, at her decease. In case at any time when such rents, interest and income shall be payable, any female descendant of any of my said children entitled to share therein shall be a feme covert, the share belonging to her shall be paid over or expended and applied for her separate benefit and on her order or receipt made *made* at the time independently of her husband as before provided in respect to my said daughters.

"Fourthly. In trust in case during the continuance of said trust any of my said daughters shall have deceased, and there shall at any time during the continuance of the trust be a want or failure of descendants of hers, to pay over the third part of

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such rents, interest and income to which she would have been entitled if living, to her brother, if surviving and her then surviving sister or sisters, and as hereinafter provided, to the then surviving descendants of any of my then deceased children, and descendants of any child to be entitled by representation to the share to which he or she would have been entitled if living, the females, if any entitled to share in such rents, interest and income if femes covert at the time, to be entitled thereto independently of their husbands respectively as above provided in respect to my said daughters. In case the surviving descendants of any one of my said children that shall have deceased shall be entitled to participate instead of such child, in the share of the rents, interest and income devised to any one of my said daughters, who shall have died leaving no descendants, or whose descendants shall have failed and her share thus have fallen in, the descendants so entitled to participate shall share among themselves in the distribution in the same proportions in which they would be entitled respectively to share in the descent and distribution of the estate of the child whom they shall represent if he or she had died at the time of any such rents, interest and income being distributable.

"Fifthly. In trust on the decease of the last survivor of my said daughters to convey, assign, deliver and distribute the whole remaining trust property to the then surviving descendants of my said children respectively, the share to the descendants of each of my said daughters to be equal to that of the descendants of each other of them, and the share of the then surviving descendants of all of my said children to be in the same proportion in which they would at the time be entitled to share in the rents, interest and income of the trust property, and in case of there then being no surviving descendants of any of my said children, then the trust property is to go to my heirs and in either case the trust is to cease. Should my said son survive all his sisters he is to have such share as would otherwise as above provided go to his surviving descendants. I suppose the property I have in my own right includes one half of the Beverly farm left to me by my father and eight thousand dollars the proceeds of the sale of the estate in Federal street in Salem, and some shares in the New Market Manufacturing Company,

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besides any other property left by my father and by my sister, Susan Burley, my intention is hereby to devise and bequeath all the property or rights, and interests in property which I have in my own right, or shall have or be authorized to devise, and bequeath at my decease as hereinbefore stated, whether I may have the same in my own right notwithstanding my being married, or otherwise under any change of circumstances.

"I desire that the agreements and provisions heretofore made for an annuity of three thousand dollars to be paid to my brother Edward Burley during his life may be fulfilled, respecting which I do not understand it be *be* requisite that I should make any provision in this will but I direct my executor and trustees to see that the same are complied with and contribute thereto out of the income of the property which I have in my own right, if this is obligatory upon me, or shall be necessary and the annuity cannot be satisfied out of other means.

"I further direct my executor to pay out of my property the sum of one hundred dollars towards making provision for the support of Abigail Waugh who attended my sister, Susan Burley, in her last illness, if the said Abigail shall survive me and if I shall not make such provision myself during my own life and direct my executor and trustees to see that she does not suffer by want.

"I further direct my executor and my trustees to see that Nancy Abbott of Beverly, formerly a domestic in my father's family and also in my own family shall not suffer from want, during her old age if she shall survive me and for that purpose to pay to her an annuity of sixty dollars a year during her life.

"I direct that bonds shall not be required of either of my said trustees before named in the Probate Office for the execution of their trust.

"I appoint my said son, William Burley Howes, executor of this will."

There was a codicil to the will of Elizabeth Howes dated December 22, 1856, making only a modification of a small legacy. The will of Frederick Howes, the husband of Elizabeth Howes, was dated February 19, 1851. The provision of his will referred to in the opinion was as follows: "The survivor of my children, if my only issue then living, may dispose

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by will of all the estate and property in trust for my descendants under this will." A codicil to the last named will, dated March 28, 1851, contained the following provision: "The last survivor of my children aforenamed, if he or she should be my only descendant then living, may dispose by will of all the property bequeathed in trust under this will. And I hereby give to such survivor full power and authority for this purpose." A second codicil, dated March 29, 1908, merely revoked a small annuity. Frederick Howes died on November 12, 1855, and his will was allowed in December, 1855. An indorsement on the back of his will, stating that notice of the petition for the allowance of the will and codicils was waived, was signed by his widow, Elizabeth Howes, and by their children. Elizabeth Howes died on April 18, 1859.

A. W. Eldredge, for the trustee, filed no brief, but stated the facts.

W. B. Durant, for Caroline A. and Christine Farley.

E. K. Arnold, for the defendants Whitney.

J. W. Farley, for the Northern Trust Company, executor of the will of Susan F. Avery, and others.

F. Burke, for Franklin G. Burley.

H. Wardwell, *pro se*, submitted a brief.

H. Wheeler, for the administrator *de bonis non* with the will annexed of the estate of Susan B. Cabot, was not called upon.

SHELDON, J. The petitioner holds a trust fund created under the will of Elizabeth Howes. She died in 1859, leaving two daughters and a son, all of whom have now died without issue. The last survivor of these children of Elizabeth Howes was Susan B. Cabot, who died in 1907.

Mrs. Howes by her will gave to her son one fourth of all the residue of her estate. The other three fourths she gave to trustees, with provisions that the income should be paid primarily to her daughters, but, in certain events, in part to her son and in part to the descendants, if any, of her daughters, until the decease of the last survivor of her daughters. The will then provided, in the fifth paragraph of the second article, that the trustees should "on the decease of the last survivor of my said daughters . . . convey, assign, deliver and distribute the whole remaining trust property to the then surviving de-

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scendants of my said children respectively, the share to the descendants of each of my said daughters to be equal to that of the descendants of each other of them, and the share of the then surviving descendants of all of my said children to be in the same proportion in which they would at the time be entitled to share in the rents, interest and income of the trust property, and in case of there then being no surviving descendants of any of my said children, then the trust property is to go to my heirs and in either case the trust is to cease." The trust fund is now to be paid to her heirs, and the question is whether those heirs are to be determined at the time of her own decease, or at the time of the death of Mrs. Cabot, the last survivor of her children. In the latter event, the fund would go to certain cousins or other collateral kindred of the testatrix. In the former event, her heirs were her son and two daughters; and, as Mrs. Cabot acquired in her lifetime the whole interest of her brother and sister by their wills, the whole fund would now be paid to the administrators of her estate with the will annexed.

As was said by this court in *Whall* v. *Converse*, 146 Mass. 345, 348, "The general rule is settled, that, in case of an ultimate limitation like that of the fund in question to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. *Dove* v. *Torr*, 128 Mass. 38, 40. *Minot* v. *Tappan*, 122 Mass. 535, 537. *Abbott* v. *Bradstreet*, 3 Allen, 587. The reasons for this rule are, that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment." The same rule often since has been re-stated by this court. *Boston Safe Deposit & Trust Co.* v. *Parker*, 197 Mass. 70. *Gray* v. *Whittemore*, 192 Mass. 367, 380. *Holmes* v. *Holmes*, 194 Mass. 552, 557. *Blodgett* v. *Stowell*, 189 Mass. 142, 143. *International Trust Co.* v. *Williams*, 183 Mass. 173. *Pierce* v. *Knight*, 182 Mass. 72. *Rotch* v. *Rotch*, 173 Mass. 125. It is needless to refer to the many other cases that might be cited to the proposition.

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It is true, however, that this principle "is not a rule of substantive law, but a rule of interpretation which has been adopted by the courts as one means of ascertaining the intention of the testator as expressed in his will, and it never should be used to defeat what from the whole will appears with reasonable certainty to have been his intention." *Heard* v. *Read*, 169 Mass. 216, 223. That intention is to be ascertained from the language of the whole will in view of all the circumstances of the case, and is to be followed unless it is inconsistent with the rules of law. *McCurdy* v. *McCallum*, 186 Mass. 464, 469. *Crapo* v. *Price*, 190 Mass. 317, 320. Accordingly, in many cases a limitation to the heirs of a testator or of a beneficiary after the termination of a life estate which is prolonged beyond the period of his own life has been construed as requiring the heirs to be determined at the date of the termination of the subsequent life estate, because it was found that otherwise an intention which the testator had clearly manifested would be frustrated. *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35, in which the doctrine is stated with sufficient citation of cases. But we do not find in Mrs. Howes's will any manifestation of such an intent.

The fact that her heirs at her death were her children, that an absolute bequest was made to her son, and that life estates were given to her daughters, does not indicate an intention that these same children should not finally take as her heirs after the termination of the special limitations which she chose to make. *Childs* v. *Russell*, 11 Met. 16. *Abbott* v. *Bradstreet*, 8 Allen, 587. *Cushman* v. *Arnold*, 185 Mass. 165. *Boston Safe Deposit & Trust Co.* v. *Parker*, 197 Mass. 70.

Nor can we say that this testatrix did not intend that her children should not have power to dispose of their respective interests in remainder, because her husband by his will had expressly given such a power to the survivor of his children, and she did not make a similar provision, and it may be inferred that she was acquainted with the contents of her husband's will.

The careful provision that the share of the income of the trust fund which was to be paid to her daughters or to their female descendants should be paid to them or for their benefit independently of their husbands does not warrant the inference

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that she wished to deprive her daughters of any interest in remainder lest they should exercise their unrestricted power of disposition by bequeathing it to their husbands. The testatrix imposed such restrictions as she chose; we cannot reverse the ordinary rule, *expressum facit cessare tacitum*, and infer that she intended to impose additional restrictions which she did not mention.

We have carefully considered all the suggestions made in the elaborate arguments, and have examined all the cases to which we have been referred; and we find nothing in the will of the testatrix which discloses any intent to benefit her collateral relatives. We are of opinion that having, as in *Rotch* v. *Rotch*, 173 Mass. 125, 133, made provision for each of her daughters during all her life and for her issue if she should leave any, and having secured to her son what she regarded as an adequate portion for him, she was content, if her children should leave no issue, to let her estate go as the law might direct.

Accordingly the petitioner should be instructed that it is his duty to pay the trust fund to the administrators with the will annexed of the estate of Susan B. Cabot.

Decree accordingly.

COMMONWEALTH *vs.* WILLIAM J. EDGERTON.

Bristol. October 26, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Elections. False Counting and Reporting of Votes. Evidence. Jury and Jurors. Practice, Criminal, Separation of jurors, New trial.

At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and knowingly making a false report of the result of the canvass and count of votes, the official tally sheets kept by the defendant in the counting of the votes are competent and are the best evidence to show what the count kept by the defendant was.

At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and know-

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ingly making a false report of the result of the canvass and count of votes, the testimony of bystanders, who observed the defendant's conduct in keeping a false tally of the votes, is admissible to show the facts which they observed although they were not election officers and were interested in the election only as citizens.

At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and knowingly making a false report of the result of the canvass and count of votes, the Commonwealth, against the objection of the defendant, introduced the testimony of the registrars of voters to show that upon a recount by them it appeared that the ballots had not been counted and reported correctly, and the jury were allowed to inspect the sheets used by the registrars at the recount and used by them in testifying to refresh their recollections, the jury being instructed that those sheets were not evidence and could not be considered by them. The defendant contended that instead of this testimony the ballots themselves, being the best evidence, should have been produced for the jury to count. *Held*, that, assuming that the production of the ballots could have been compelled, which was doubted, there being no question raised as to any irregularities appearing on the face of the ballots, the number of the ballots cast on one side and the other was a matter of computation, and that the computation could be testified to by any one who made it, and therefore, that the registrars, refreshing their recollections by referring to the sheets used by them at the recount, properly could testify as to the result of the recount so far as it related to the count and report made by the defendant, and that the jury properly were allowed to inspect the sheets for the purpose of assisting them in passing upon the credibility of the registrars.

At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes upon the question of the granting of licenses for the sale of intoxicating liquors in a city and in knowingly making a false report of the result of the canvass, there was evidence that the defendant made marks on a tally sheet as another election officer called off the answers on the ballots, for the purpose of keeping an account of the votes, that in doing so he marked twenty-one more votes for license, fifteen less votes against license and six less blanks than the other election officer called off to him and than afterwards appeared to be the true numbers upon a recount by the registrars of voters, and also that, when the defendant became aware that two bystanders were following the count, he kept the tally correctly. There was other evidence from which guilty knowledge on the part of the defendant could have been inferred. It further appeared that the defendant and the election officer who called off the answers to him signed the tally sheets thus marked by the defendant, and that these tally sheets were delivered to and received by those charged with the duty of declaring the results of the election as the reports of the results of the votes counted and canvassed by the defendant and the other election officer who signed them. *Held*, that there was evidence for the jury that the defendant wilfully made a false count and knowingly made a false report of the canvass of votes, that the count and canvass by the defendant and the election officer who called off the answers were none the less a count and canvass by the defendant because he merely marked the tally sheets while the other handled the ballots, and that the tally sheets signed by the two constituted and were intended to constitute reports of the results of the votes counted by them.

At the trial of a criminal case the jury retired to consider their verdict at about

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eleven o'clock in the morning. They all were taken to a midday dinner. At about seven o'clock in the evening the officer in charge of the jury asked them whether they cared for supper, and, upon being told that they did, made preparations accordingly. One juryman said that he did not feel well and did not care for supper and would stay and smoke. The other jurors were taken to supper by the officer and this juryman was left in the jury room, which was locked and remained locked until the rest of the jury returned. The jury deliberated all night, and did not reach a verdict until after breakfast the next morning, at about ten o'clock. When the jury were taken out to supper the court had adjourned, and therefore the matter of leaving the juror alone in the jury room was not brought to the attention of the judge at that time. The jury returned a verdict of guilty, and the defendant filed a motion for a new trial on the ground that the jury had been allowed to separate after the case had been submitted to them and before they had arrived at their verdict. The judge denied the motion, and in doing so found as matter of fact that the officer and the juror acted in good faith and that the reasons which the juror gave for not wanting to go to supper were true; that the juror remained locked in the jury room alone all the time the other jurors were absent; that he saw no one and spoke to no one; and that nothing occurred during their absence to influence his mind in arriving at a verdict. The judge also found that there was no talk among the other jurors at the supper table in regard to the case, and that, even if some of the jurors did talk about the case in going from and returning to the court house, what was said was of a casual and informal nature and could not reasonably be considered a part of the deliberations of the jury. He also found that, although the juror might have heard and might have been influenced by the remarks made by some of the jurors if he had been with them in going to and returning from supper, the matter was too unsubstantial to justify setting aside the verdict, and that the facts did not show a reasonable probability that the rights of the defendant had been violated. The judge ruled as matter of law that on the facts found by him the defendant was not entitled to a new trial, and denied the motion as a matter of discretion. *Held*, that it could not be said as matter of law that there was any error in the rulings or the findings of the judge.

MORTON, J. This was an indictment in two counts under St. 1907, c. 560, §§ 270, 410, charging the defendant with wilfully performing his duty as an election officer contrary to law by knowingly making a false count of votes on the license question, and by knowingly making a false report of the result of a canvass of votes on said question at the municipal election for the city of New Bedford, held December 3, 1907.

There was a verdict of guilty on each count, and the case is here on exceptions by the defendant to the refusal of the judge * to direct a verdict for the defendant, and to the refusal of the judge to give other rulings requested by the defendant; also to the admission of evidence, and to the findings of fact and rulings

* *Schofield, J.*

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of law made upon a motion for a new trial, which was filed by the defendant.

It appeared that the defendant was duly appointed an election officer and acted as such at the election in question in Precinct 9 of Ward 3, and that he was assigned by the warden or presiding officer to work with one Jennings in canvassing and counting the ballots which were cast in that precinct. It also appeared that after the polls were closed the ballots were taken from the ballot box and arranged by the election officers, of whom, including the defendant, there were six, in blocks or packages of fifty ballots each. There was testimony tending to show that in canvassing and counting the ballots the course pursued by Jennings and the defendant was as follows: Jennings would take a block of ballots and call off from each ballot the names of the persons voted for, and "yes" or "no" or "blank" according as the license question was answered "yes" or "no," or not at all, and the defendant would make a mark upon a tally sheet under the name of the person voted for and against the word "yes" or "no" or "blank," according to the announcement made by Jennings. There was a tally sheet for each block or part of a block. After a block had been thus canvassed and counted the defendant would slide the tally sheet over to Jennings, who would announce the totals, and the defendant would enter the figures thus given in a column headed "totals" at the right of the tally sheet. The tally sheet was then signed by Jennings and the defendant and folded up and placed with the ballots in the envelope from which the latter had been taken, and afterwards the totals on each tally sheet were entered by the clerk on a sheet called the total vote sheet. After the ballots had all been counted they were placed in a box which was sealed up and sent with the tally sheets, total vote sheets, a book called the precinct book containing the result of the votes cast in the precinct as ascertained by the election officers, the check lists, unused ballots and ballot box, to the city clerk. After the election there was a recount of the ballots by the registrars of voters on the license question, and the results of their count of blocks 3, 5 and 6 differed materially from the results of the counts of those blocks as shown by the tally sheets kept by the defendant. These blocks and block 9 were specified

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by the district attorney, in answer to the defendant's motion for a bill of particulars, as those in regard to which the alleged false count and report were made by the defendant. There was also other evidence tending to show that the defendant's count of these blocks was not correct. All of the other election officers were summoned by and testified as witnesses for the Commonwealth. The defendant was a witness in his own behalf.

1. The city clerk was called as a witness by the district attorney, and produced the tally sheets, twelve in number, used by the election officers in the precinct, on the day of election, and they were offered in evidence by the district attorney, and were admitted, subject to the defendant's objection and exception that they were not competent to prove the charges contained in the indictment and specifications. It was part of the Commonwealth's case to show, if it could, that the count and report made by the defendant were wrong. In order to do that it was necessary to show what the count and report made by the defendant were. The tally sheets kept by him of the blocks specified were the best evidence of the count and report made by him of the ballots contained in those blocks, and were plainly competent. No objection was made to the admission of the tally sheets on the ground that they included tally sheets kept by other officers. If there had been, no doubt such other tally sheets would have been excluded. Moreover the judge carefully instructed the jury that any acts or irregularities in which the defendant took no part should have no effect against him, and the jury must be presumed to have followed the instruction thus given.

2. The testimony of the bystanders Garside and Cram * was

* Garside was a reporter for the New Bedford Standard, a daily newspaper, and Cram was a reporter for the New Bedford Times, another daily paper. They were standing outside the rail and kept count of the license vote as Jennings called it off. Among other things, Garside testified as follows:

"I kept a count in my note book of block 3. I made it 22 yes and 22 no and did not count blanks. Edgerton made 30 yes and 19 no and 1 blank. I looked then to see which was first the yes or the no, and I spoke to Cram. I counted the next block as follows — 20 yes, 25 no and 5 blanks. I asked Edgerton what he made and he said that he had 28 yes, 17 no, 5 blanks. I counted block 6 and saw Cram count also, that was the block on which there

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plainly admissible on the issue whether the defendant wrongly counted and reported the ballots counted and reported by him. The fact that they were not election officers and were interested in the election only as citizens did not render their testimony as to what they observed in regard to the defendant's conduct inadmissible.

3. The testimony of the registrars of voters in regard to the recount was also plainly admissible on the question whether the ballots had been correctly counted and canvassed. The defendant contends that the ballots themselves should have been produced for the jury to count as the best evidence. It may be doubted whether their production could have been compelled. But, however that may be, the question was whether the tally kept by the defendant was a correct tally or count, and any one who had counted the ballots or who had followed the count or tally kept by another could testify thereto, as to any other competent fact within his own observation. While in a sense the ballots themselves were the best evidence of the number cast pro and con on the license question, they were not from the nature of the case the only evidence. The number was a matter of computation and the computation could be testified to by any one who made it. No question was raised, so far as appears, as to whether any of the ballots had or had not been properly counted by reason of any irregularities appearing upon the face thereof. The registrars were properly allowed to refresh their recollection by referring to the sheets used by them at the recount, and the jury were properly allowed to inspect the sheets for the purpose of assisting them in passing

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was a misunderstanding between Jennings and Edgerton. I did not find out whether the disputed ballot was a 'blank' or a 'no.' I made the count 19 yes, 29 no and 1 blank, having one uncertain. On the next block Cram stood at the rail marking down, we counted the same as Edgerton. On the next block I counted the no votes in my head and Cram counted the noes also. Our count was the same as Edgerton."

In cross-examination Garside further testified, "I did not keep the last count in the book because I thought mistakes might continue to be made if they did not know they were being watched. I reasoned that way as soon as it became evident that no mistakes were made on one block when Cram stood at the rail taking counts. There was every appearance of intentional wrong count. I came to that conclusion after three blocks had been counted."

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upon the credibility of the registrars. The jury were expressly instructed that the sheets thus used by the registrars to refresh their recollection were not evidence and could not be considered by them. The fact that the defendant had no notice of and was not present at the recount was immaterial. The statute contains no provision for such notice in a case like the present. St. 1907, c. 560, § 300. Neither was the fact that certain requirements of the statute were not observed at the recount material. The legality or illegality of the recount was not in issue; and the failure to observe the statutory requirements which it was contended were not observed was not shown and could not have been found to have affected the correctness of the recount.

4. The defendant asked the judge to instruct the jury that there was no evidence that he counted any votes, or knowingly and wilfully made a false count, or knowingly made a false report of any count or canvass of votes. The judge refused to do so and the defendant excepted. Full instructions were given to which no objection was made except to the refusal to give the above instructions. We think that the presiding judge was right in refusing to give the instructions requested. It could not have been ruled that there was no evidence that the defendant counted any votes or made a report of a count and canvass. He made marks on the tally sheet as Jennings called off the answers, for the purpose of keeping an account of the votes, and the jury were warranted in finding that this constituted a counting and canvassing of the votes by him. It was not necessary that he should handle each ballot in order to count and canvass the votes. The count and canvass was none the less a count and canvass by the defendant because made by Jennings and himself, each assisting the other, Jennings handling the ballots and the defendant keeping the count. The jury were also warranted in finding that the tally sheets signed by Jennings and the defendant constituted and were intended to constitute reports of the results of the votes counted and canvassed by them and were so regarded by those charged with the duty of declaring the results of the election. There was also evidence warranting the jury in finding that the defendant wilfully and knowingly made a false count and canvass and a false report of the votes

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counted and canvassed by him. There was testimony tending to show that in blocks 3, 5 and 6 there was an error of forty-two votes, — the recount showing twenty-one less votes in favor of license, fifteen more against it, and six more blanks. The total number of ballots in these three blocks was one hundred and fifty. Jennings was a witness for the Commonwealth and testified in substance that he called off the votes correctly. The whole number of votes in the city on the license question was upwards of eight thousand. The majority for license on the original count of the whole vote was one hundred and eighty. On the recount this was reduced to ninety-three. Of the eighty-seven votes thus shown to have been wrongly counted for license, thirty-eight or almost one half, were shown or could be found to have been shown to be in the three blocks of ballots of fifty each, counted and canvassed by the defendant. This warranted the jury in finding either that he was grossly incompetent or that the errors were committed by him wilfully and knowingly. There was also evidence tending to show that, after he became aware that Garside and Cram were following the count, the defendant kept the tally correctly. There was likewise evidence of conversations with and statements made by the defendant which the jury may have thought more consistent with guilty knowledge on his part than with any other reasonable explanation. The rulings requested by the defendant could not therefore have been properly given.

5. The jury retired to deliberate upon their verdict about eleven o'clock. They were all taken to dinner. About seven o'clock in the evening the officer in charge of them asked if they cared for supper, and, upon being told that they did, made preparations accordingly. One juryman said that he did not feel well and did not care for supper and would stay and smoke. The other jurors were taken to supper by the officer and this juryman was left in the jury room, which was locked and the key was left outside near the door, in its accustomed place. When the jury returned the juror was found in the jury room with the door locked. The jury deliberated all night and did not reach a verdict until after breakfast about ten o'clock the next morning. The court had adjourned when the jury were taken out to supper, and the matter of leaving the juror alone

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in the jury room was not therefore brought to the attention of the judge at that time. After the verdict was rendered the defendant filed a motion for a new trial, one ground of which was that the jury had been allowed to separate after the case had been submitted to them and before they had arrived at their verdict. The judge denied the motion and the defendant excepted thereto. The decision of the presiding judge is not open to revision here unless there was as matter of law some error in his rulings or findings. *Nichols* v. *Nichols*, 136 Mass. 256. He found as matter of fact that the officer and the juror acted in good faith and that the reasons which the juror gave for not wanting to go to supper were true; that he remained locked in the jury room alone all the time the other jurors were absent, saw no one and spoke to no one; and nothing occurred during their absence to influence his mind in arriving at a verdict. The judge also found that there was no talk between the other jurors at the supper table in regard to the case, and that, even if some of the jurors did talk about the case in going from and returning to the court house, what was said was of a casual and informal nature and could not reasonably be considered as a part of the deliberations of the jury; and he found that, although the juror might have heard and have been influenced by the remarks made by some of the jurors in going to and returning from supper, the argument was too unsubstantial to justify setting aside the verdict, and the facts did not show a reasonable probability that the rights of the defendant had been violated. He ruled as matter of law that, on the facts found by him, the defendant was not entitled to a new trial, and he refused to allow the motion as a matter of discretion. We do not see how it can be said as matter of law that there was any error in his rulings or findings. The only difference between this case and *Commonwealth* v. *Gagle*, 147 Mass. 576, is that in that case the juror was permitted by the court to remain in the jury room under the charge of an officer. But if what took place in that case did not constitute as matter of law such a separation as to prejudice the rights of the defendant, we do not see how what took place here can be held as matter of law to have constituted such a separation. See also *Nichols* v. *Nichols*, 136 Mass. 256. Sound public policy requires that the safeguards which have been es-

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tablished to insure verdicts free from all improper influences should be strictly maintained; but as was said in *Nichols* v. *Nichols*, the court "ought not to be swift to grant a new trial on account of irregularities not attended with any intentional wrong, and where it is made satisfactorily to appear that the party complaining has not and could not have sustained any injury from them."

Exceptions overruled.

J. Walsh, for the defendant.

J. M. Swift, District Attorney, (*F. B. Fox*, Assistant District Attorney with him,) for the Commonwealth.

MAX L. LIZOTTE *vs.* LEONORA DLOSKA & another.

Bristol. October 26, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Performance and breach. *Attorney at Law. District Attorney. Practice, Criminal, Nolle prosequi. Review.*

Where an attorney at law receives from a client a sum of money to pay the expenses and disbursements and for services of the attorney in procuring bail and defending two persons against whom criminal charges are pending in the Superior Court, "balance to be returned" to the client, and by arrangement between the attorney and the district attorney one defendant pleads guilty and pays a fine as to one charge, and the district attorney agrees not to prosecute the other cases further but to make an entry of *nolle prosequi* therein at a subsequent sitting of the court, the service which the attorney agreed to render to his client is completed, since, the district attorney having absolute power to enter a *nolle prosequi* upon his official responsibility, it will not be assumed that his promise will be broken, and since the presence of the defendants in court was not necessary for the making of such entries; and therefore the time has arrived when the attorney should pay to his client any balance left in his hands after deducting from the money the client had paid him the disbursements which he has made and a reasonable charge for his services, and the client need not wait, before bringing an action to enforce his rights, until the formal entries of *nolle prosequi* have been made.

At the hearing in review of an action of contract against an attorney at law to whom the plaintiff had paid a sum of money "to be used in obtaining bail and paying all expenses and fines and for services in getting bail, and to defend F.

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and G. against cases in the Superior Court, balance to be returned to" the plaintiff, it appeared that, at the time when the agreement with the attorney was made, F. and G. were under indictment and in jail, that the attorney procured persons to go on their bail bonds, depositing with one of the bondsmen money as security, and taking from him a receipt stating that "after such defendants have been disposed of in the Superior Court," the deposit less a fee for services as surety should be returned. The attorney in February made an arrangement with the district attorney whereby F. pleaded guilty and paid a fine in one case and the district attorney agreed to enter a *nolle prosequi* in all the other cases at the next, namely, the June sitting of the court. Thereupon, on February 19, the attorney received back from the surety, with whom he had deposited the money as security, the sum so deposited less the surety's fee, and gave to the surety a receipt stating that the cases had "been disposed of by Superior Court on February 15, and therefore the . . . [surety] . . . is held no further as such surety." In April the action which was being tried in review was brought against the attorney. The entries of *nolle prosequi* were not made in the criminal cases against F. and G. until July. The attorney contended that the action was brought against him prematurely. *Held*, that findings were warranted that at the time the action was brought the purposes for which the money had been placed in the attorney's hands had been accomplished and that the action therefore was not brought prematurely.

REVIEW of action of contract. The plaintiff in review was the defendant in the original action, which was for a balance alleged to be due to the plaintiffs therein, the defendants in review, under the circumstances stated in the opinion. Writ in the original action in the Second District Court of Bristol dated April 27, 1906. Judgment was entered for the plaintiff therein on default of the defendants for $616.20. At the trial of the case in review in the same court, the judgment was reduced by $52.01.

On appeal, the case in review in the Superior Court was referred to an auditor with the stipulation that his findings of fact should be final. The substance of his findings is stated in the opinion. At a hearing upon the auditor's report, *Dana*, J., refused to rule that the original action was prematurely brought, or that judgment therein should be reversed, and the plaintiff in review appealed.

A. G. Weeks, for the plaintiff in review.

F. A. Pease, for the defendants in review.

RUGG, J. This is a writ of review. It was referred in the Superior Court to an auditor, with the stipulation that his finding of facts should be final. At the hearing upon his report the fundamental question raised was whether the original action

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was prematurely brought. The action was instituted on April 27, 1906. The plaintiff in review, an attorney at law, in January, 1906, was given by the defendants in review $600 dollars "to be used," as stated by him in his contemporaneous receipt, "in obtaining bail and paying all expenses and fines and for services in getting bail, and to defend John Farra and Joseph Goyeski against cases in the Superior Court, the balance to be returned to" the defendants in review. He immediately procured the bail and paid attendant expenses, including an allowance to one of the bondsmen. In February following, Farra pleaded guilty to a complaint for assault and was fined, the plaintiff in review paying the fine. At the same time, and before any trial was begun, the other cases were disposed of by agreement with the district attorney that they should be "*nol prossed*" at the June sitting following.

The district attorney had the absolute power to enter a *nolle prosequi* upon his official responsibility, without the approval or intervention of the court. He alone is answerable for the exercise of his discretion in this respect. It is presumed that he will act under such a heavy sense of obligation for enforcement of the law and sensitive consciousness of important public duty that no wrongful act will be committed. *Commonwealth* v. *Wheeler*, 2 Mass. 172. *Commonwealth* v. *Tuck*, 20 Pick. 356. The entry of a *nolle prosequi* is final so far as the particular case is concerned. It does not require the presence nor the consent of the defendant. Therefore the agreement of the prosecuting officer, that the indictments or complaints should not be further prosecuted and that an entry upon the records of the court should be made to that effect at an early sitting, was tantamount to the completion of the service which the plaintiff contracted to render in defending Farra and Goyeski in the criminal proceedings pending against them. It is not to be assumed that the word of a prosecuting officer will be broken respecting the disposition of cases, in instances where the whole matter lies in his own hand. It is significant of the view which Lizotte took of the situation that, after the district attorney had said he would not further prosecute the cases, he collected $200, which had been deposited with one of the bondsmen, at the same time paying him for his services as such and giving a receipt, which

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stated that the cases had been disposed of and there was no longer liability as surety.*

It is not necessary to discuss whether the statement that the surety was relieved from further liability was technically accurate. It was practically so treated by all parties, including the district attorney in his capacity as responsible representative of the obligee on the bond. The cases had been disposed of so far as the plaintiff was concerned. In his account for services and disbursements the plaintiff in error made no charge after February, 1906.

Under these circumstances the finding of the auditor that at the time of the bringing of the original action "the purposes for which the money had been placed in the hands of Lizotte had been accomplished and the suit was not prematurely brought" was fairly supported by the facts reported. The rulings requested in the Superior Court were properly refused.

Exceptions overruled.

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* Lizotte paid this $200 to one of the bondsmen at the time when he went on the bonds, and took from him the following receipt: "January 3, 1906. Received of Leonora Dloska and Maria Gaueska by hand of M. L. Lizotte two hundred dollars, deposited in my hands for going bail for John Farra and Joseph Goyouski [Goyeski], held for Grand Jury, etc. If the said Farra and Goyouski appear as commanded and make no default, I hereby agree to return said money to said Lizotte or said Dloska and Gaeuska after such defendants have been disposed of by the Superior Court, less a reasonable amount for expenses and fee for furnishing said bail. Samuel Macarovsky." On February 19, 1906, he received back from Macarovsky $165, and gave him the following receipt: "February 19, 1906. Received of Samuel Macarovsky one hundred and sixty-five dollars, money deposited in his hands for going surety in the cases of John Faras [Farra] and Joseph Goyousky [Goyeski], which cases has been disposed of by Superior Court on Feb. 15, 1906, and therefore the said Macarovsky is held no further as such surety. The said Macarovsky's charges for furnishing said bail is thirty-five dollars. The whole amount deposited in my hands was two hundred dollars. M. L. Lizotte."

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HENRY HILLIARD *vs.* FELLS ICE COMPANY.

Essex. November 4, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Tax. Corporation, Foreign.

Under St. 1903, c. 437, § 71, which provides that every foreign corporation which is subject to the provisions of that act "shall be subject to taxation upon all real estate, machinery and merchandise owned by it and situated in this Commonwealth by the city or town in which such property is situated," and providing further that "the taxes authorized by the provisions of this section shall be assessed, collected and paid in accordance with the provisions of chapters twelve and thirteen of the Revised Laws," machinery and merchandise belonging to a foreign corporation which is subject to the provisions of the act are subject to local taxation in the city or town where they are situated in the same way as the real estate belonging to such corporation, although the corporation does not hire or occupy a manufactory, store or shop in the city or town and therefore its machinery and merchandise are not taxable there under clause 1 of R. L. c. 12, § 23. This clause is inapplicable, the reference in St. 1903, c. 437, § 71, to the provisions of chapters twelve and thirteen of the Revised Laws being merely for the purpose of directing how the tax that is authorized shall be assessed and collected.

MORTON, J. This is a petition brought by the collector of taxes for the town of Georgetown under St. 1902, c. 349, to restrain the respondent, a foreign corporation organized under the laws of Maine, from doing business in this Commonwealth, until a tax, alleged to have been duly and lawfully assessed upon it by the assessors of Georgetown, shall have been paid. The case was heard upon agreed facts and a decree was entered in favor of the petitioner restraining the respondent from doing business in this Commonwealth "until the tax mentioned in the complainant's petition with all incidental costs and charges including the costs of this suit shall have been paid." The respondent appealed from this decree.

The respondent carries on the retail ice business in Malden where it has its only office, keeps its books, employs an office force, keeps its wagons and horses, has its stables and transacts all its business. One of the sources of its ice supply is at Georgetown where it owns several ice houses on the shores of Pentucket Pond, a great pond, in which it stores ice cut on that

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pond. The ice so cut is transported to Malden and there used by the respondent in its retail business. It sells only such ice as it cuts and stores itself. It has a steam engine and boiler at its ice houses at Georgetown which are only used for cutting and storing ice in those houses and has no other personal property in Georgetown except the ice harvested and stored in those ice houses for its use in Malden. It transacts no business at Georgetown except what is essential to the cutting, storing and delivering of the ice pursuant to orders from the Malden office. It is agreed that the ice is merchandise and constitutes the respondent's stock in trade. In 1907 the town of Georgetown assessed the tax in question upon the steam engine, boiler and the ice stored in the ice houses, and the only question is whether the tax so assessed was a valid tax.

St. 1903, c. 437, § 71, provides that ". . . every foreign corporation which is subject to the provisions of this act shall be subject to taxation upon all real estate, machinery and merchandise owned by it and situated in this Commonwealth by the city or town in which such property is situated. The taxes authorized by the provisions of this section shall be assessed, collected and paid in accordance with the provisions of chapters twelve and thirteen of the Revised Laws."

It is not contended that the respondent was not subject to the provisions of St. 1903, c. 437, and it is plain that it had machinery and merchandise in the town of Georgetown where the tax in question was assessed. The respondent did not hire or occupy a manufactory, store, or shop in Georgetown, and therefore did not come within R. L. c. 12, § 23, cl. 1, and was not taxable there under that clause for the engine, boiler and ice. *Hittinger* v. *Westford*, 135 Mass. 258. *Hittinger* v. *Boston*, 139 Mass. 17. *Coffin* v. *Artesian Water Co.* 193 Mass. 274. And the respondent contends that, inasmuch as the taxes authorized by § 71, *supra*, are to be "assessed, collected and paid in accordance with the provision of chapters twelve and thirteen of the Revised Laws," it follows that this tax was not lawfully assessed. But the reference to those chapters is for the purpose of providing generally how the tax that is authorized shall be assessed and collected. Except for such a reference the Legislature would have been obliged to provide at length for the

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assessment and collection of the tax. To give the provision any other construction would nullify the requirement that the real estate, machinery and merchandise belonging to a foreign corporation and situated in this Commonwealth shall be taxed to it in the city or town where it is situated. It is manifest, we think, that it was the intention of the Legislature that machinery and merchandise belonging to foreign corporations should be subject, like real estate belonging to them, to local taxation in the city or town where it was situated, and that the laws relating to the assessment and collection of taxes on property so situated should apply in these as in other cases. This construction of the statute rendered it unnecessary to refer in it by way of repeal or otherwise to the clause relied on by the respondent. It plainly would be inapplicable.

Decree affirmed.

R. F. Metcalf, for the petitioner.

B. M. Fernald, for the respondent, submitted a brief.

WILLIAM H. CUNNINGHAM, trustee, *vs.* CONNECTICUT FIRE INSURANCE COMPANY.

Essex. November 4, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Practice, Civil, Agreed statement of facts. *Insurance,* Fire, Parol contract for. *Contract,* What constitutes.

Where a case is tried upon an agreed statement of facts which contains no stipulation that the trial court may draw inferences of fact from the facts agreed upon, the plaintiff must fail unless among the facts contained in the agreed statement are included all the elements which the law requires to establish his claim.

An action of contract, to recover from a fire insurance company the amount of damage by fire to certain stock and fixtures alleged to have been insured by the defendant, was heard upon an agreed statement of facts which contained no stipulation that the trial court might draw inferences of fact from the facts agreed upon. The right of the plaintiff to maintain the action if any agreement for insurance was made by the defendant was not disputed. The agreed facts were that the owner of the stock and fixtures went on December 15 to one who was admitted to be an authorized agent of the defendant, but who also was agent

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for several other insurance companies, and requested the issuance of policies of insurance upon certain identified property to the amount of $3,000, the policies to be in the Massachusetts standard form and to be delivered by the agent at a later date. Nothing was said as to the companies by which the policies were to be written, as to the amount of insurance to be assumed by each company, as to the premium to be paid, the term for which the policies were to run, or as to how the insurance was to be apportioned between the stock and fixtures. The agent wrote all the policies bearing date December 15 in four different companies, of which the defendant was one. Later, and before December 25, he decided that the companies which he represented should not assume the entire insurance and therefore got an agent for other companies to procure insurance for $2,000. No details of his acts were communicated to the owner, nor were the policies delivered to the owner before the fire, which occurred on December 25. *Held*, that the relations between the owner and the agent rested in negotiation and had not reached the finality of a contract.

CONTRACT. The declaration contained five counts, all of which sought recovery from the defendant as the insurer of certain stock and fixtures damaged by fire, the plaintiff being the trustee in bankruptcy of the alleged insured, Solomon Yaffee. The first count alleged that the defendant "made to" Yaffee a policy of insurance, the second and third alleged that the defendant agreed to insure and to deliver a policy, but neglected and refused to deliver the policy. The fourth count was upon an accounting together and the fifth for interest. Writ in the Lynn Police Court dated November 5, 1907.

On appeal to the Superior Court, the case was heard before *Fessenden*, J., upon an agreed statement of facts which contained no stipulation that the court might draw inferences of fact. The material facts are stated in the opinion. The presiding judge found for the defendant and the plaintiff appealed.

The case was submitted on briefs.

F. V. McCarthy & R. F. Bergengren, for the plaintiff.

F. W. Brown & L. K. Foster, for the defendant.

RUGG, J. This case comes before us upon appeal from a judgment in favor of the defendant entered upon agreed facts, with no stipulation that the trial or appellate court might draw inferences of fact. The issue thus presented is whether upon these facts the plaintiff, as matter of law, is entitled to judgment. Unless among the facts agreed are found all the elements which the law requires to establish his claim, the plaintiff must fail. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536. *Mayhew* v. *Durfee*, 138 Mass. 584. *Collins* v. *Waltham*, 151

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Mass. 196. *Schwarz* v. *Boston*, 151 Mass. 226. *Gallagher* v. *Hathaway Manuf. Co.* 169 Mass. 578. *Courtemanche* v. *Blackstone Valley Street Railway*, 170 Mass. 50. *Olds* v. *City Trust, Safe Deposit & Surety Co.* 185 Mass. 500. *Putnam* v. *Glidden*, 159 Mass. 47. *Jaquith* v. *Winnisimmet National Bank*, 182 Mass. 53. *Boston* v. *Brooks*, 187 Mass. 286. *Morse* v. *Fraternal Accident Association*, 190 Mass. 417. *Koppel* v. *Massachusetts Brick Co.* 192 Mass. 223. *Coffin* v. *Artesian Water Co.* 193 Mass. 274. The question presented is radically different from that which would arise upon a record where on facts stated the court is permitted to draw whatever inferences of fact seem reasonable. Then the inquiry is whether there is any evidence warranting the finding. Such a question is analogous to, if not like, that arising upon exceptions to a verdict of a jury or a finding of a court upon all the evidence. Then not only all the supporting facts but also all rational inferences from them may be invoked to support the conclusion reached by the trial tribunal. Such a decision would not be disturbed unless unwarranted by all the evidence, including both the specific facts and the deductions legitimately to be drawn from them. *Commonwealth* v. *Gordon*, 159 Mass. 8. *Davis* v. *Harrington*, 160 Mass. 278. *McKim* v. *Glover*, 161 Mass. 418. *Wright* v. *Lowell*, 166 Mass. 288. *Johnson* v. *Mutual Ins. Co.* 180 Mass. 407.

The only contention pressed by the plaintiff is that one Yaffee, of whose estate he is trustee in bankruptcy, made with the defendant, through its authorized agent, a binding parol contract of insurance. The authority of the agent is not in dispute; nor can it be argued that there may not be a valid contract of insurance resting only in parol. The only question is whether the agreed facts prove the making of such a contract. These facts are that on December 15, 1906, Yaffee applied to one Knight, who was agent for several other insurance companies besides the defendant, and requested the issuance to him of policies of insurance on certain identified property to the amount of $3,000. Nothing was said as to the companies by which the policies should be written, as to the amount to be assumed by each company, as to the premium, nor as to the term of the policies. The policies were to be in Massachusetts standard form, and were to be written by Knight, and Yaffee was to receive them at some

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later date. There was no further communication between Yaffee and any one representing the defendant, until after the property sought to be insured was injured by fire.* Knight wrote policies all bearing date December 15, 1906, in four different companies, aggregating the sum total applied for, but dividing the risk upon the property to be insured between stock and furniture. None of these policies were delivered to Yaffee, nor were their contents communicated to him. Between the fifteenth and twenty-fifth days of December, Knight decided that he ought not to issue policies for the entire amount in companies which he represented, and he requested another insurance agent to issue policies to the amount of $2,000 on the property. These policies, although written, were never delivered, and Yaffee knew nothing about them until after the fire. These facts show that the relations between Yaffee and Knight rested in negotiation, and had not reached the finality of a contract. Without a word of instruction, request or intimation from Yaffee, Knight determined the companies (subsequently changing them) in which the insurance should be placed, and the time for which the policies should run, and a division of the risk between stock and fixtures. None of these essential elements of the contract of insurance were either fixed in advance or subsequently agreed to between the parties. In any one of these respects Yaffee could have objected to the policies as drafted by Knight and could have declined to receive or pay for them. If he had so decided, no liability would have attached to him, nor could he have been made responsible for the premium until he had agreed to these stipulations of the contracts. The proposals, which Knight arranged upon these points, were not submitted to nor accepted by Yaffee until after the fire, when by its acts the defendant declined to go further with the insurance contracts. There was no understanding expressed or fairly implied under these circumstances that the property of Yaffee should be immediately protected from the time of the interview. The conversation is described in the facts as being an application for policies, indefinite in the important particulars heretofore enumerated, which Yaffee was to receive at a time in the future. This indicates the early stage

* The fire occurred on December 25, 1906.

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of discussion, and not a consummated or final agreement. Therefore the cases, of which *Sanford* v. *Orient Ins. Co.* 174 Mass. 416, is an example, are not applicable. There is here no binding slip, as in *Lipman* v. *Niagara Ins. Co.* 121 N. Y. 454, nor any course of dealing from which a mutuality of understanding can be implied, as in *Eames* v. *Home Ins. Co.* 94 U. S. 621, 629. *Baker* v. *Commercial Union Assurance Co.* 162 Mass. 358. The record is bare of any facts from which can be gathered a meeting of minds of Yaffee and Knight as to some of the essential elements of an oral contract of insurance. *Cleveland Oil Co.* v. *Norwich Ins. Co.* 34 Ore. 228.

Moreover, the facts are susceptible of the construction that the parties never intended any oral contract of insurance, and that they only contemplated a contract springing into existence upon the delivery of the policies and the payment of the premiums. In this aspect of the agreed facts, *Wainer* v. *Milford Ins. Co.* 153 Mass. 335, 339, and *Meyers* v. *Liverpool & London & Globe Ins. Co.* 121 Mass. 338, are decisive in favor of the defendant. It follows that the plaintiff has failed to sustain his case.

Judgment for the defendant affirmed.

STEPHEN A. LANEN *vs.* HAVERHILL, GEORGETOWN AND DANVERS STREET RAILWAY COMPANY.

SAME *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Essex. November 5, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence. Street Railway.

A motorman operating a car on a track over which he passes many times every day, who, in violation of a rule of the corporation by which he is employed, fails to lessen the speed of his car when approaching at the entrance of a bridge a sunken joint in the tracks depressed about two inches, of which he has known for at least a month, knowing also that such a joint may send the car off the track and against the bridge, if he is injured in consequence of the car leaving the track and running against a post of the bridge, cannot recover from his employer for his injuries, as there is no evidence that he was in the exercise of reasonable care.

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TWO ACTIONS OF TORT, by a motorman injured, while in the employ of the defendant in the first case, by reason of the car which he was operating leaving a track, owned and maintained by the defendant in the second case, and crashing into a post forming a part of the bridge between the main part of Haverhill and that part of Haverhill called Bradford, owing to an alleged defect in the track. Writs dated October 12, 1903.

In the Superior Court the cases were tried together before *Sherman*, J., who at the close of the plaintiff's evidence ruled that the plaintiff was not entitled to recover, and ordered the jury to return a verdict for the defendant in each of the cases. The plaintiff excepted, and by agreement of the parties the judge reported the cases for determination by this court. If the ruling and direction of the judge were right, judgments were to be entered on the verdicts. If the ruling and direction of the judge were wrong in either case or in both cases, the verdict was to be set aside in either or both cases, as justice might require, and the case or cases were to stand for a new trial.

H. H. Cole, for the plaintiff.

J. P. Sweeney, for the defendants.

KNOWLTON, C. J. The plaintiff was a motorman running a car, owned by the defendant in the first case, over a track owned and to be kept in repair by the defendant in the second case. The car which he was running left the track just before it reached a bridge, covered with plank, over the Boston and Maine Railroad in Bradford in the city of Haverhill, which is immediately southerly of the bridge over the Merrimac River between Bradford and the main part of Haverhill. The planking on the bridge over the Boston and Maine tracks was thirty feet long. The space between that planking and the bridge over the Merrimac River was covered with stone paving, and its length was about twenty feet. The rails in the stone pavement of the street southerly of the railroad bridge were the ordinary girder rails, and those through the planking of the bridge were T rails. The junction of the easterly T rail with the girder rail was about five feet southerly of the planking of the bridge over the railroad, and the junction of the westerly T rail with the girder rail was about twenty feet southerly of the planking. At the joint of

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these easterly rails a small piece was broken off from the flange at the base of the girder rail on the inner side, but, as this was not what kept the wheels on the track, there is nothing to show that it was a cause of the accident. At the junction of these two rails of different kinds there was a loose or low joint which is supposed to have been the cause of the cars leaving the track, but there was testimony that there was more than one such joint within a short distance, and it was not certain upon the evidence which of the joints caused the accident. The evidence tended to show that it was one of the two above mentioned.

The plaintiff testified that he had been a motorman running cars for the first defendant over this track all the time but about four months for between five and six years; that he passed over these tracks many times every day; that he had often noticed the joints between these two kinds of rails at that point, and that he noticed that there was a low joint in the block paving over the abutment; at one time he said it was what might be called a sunken joint, very slightly sunken, "not more than an inch — less than an inch"; afterward he said it might be two inches; he added, "Well, I should say it was two inches, anyway." He said he had seen this sunken joint at least a month before the accident, but had made no report of it to anybody; that he knew it was the duty of the motorman to pass over such joints slowly and with care, for the reason that there is always danger of going off the rail; that he knew before the accident that a sunken joint of two inches might send a car off the track; that he could not remember anything that happened that day after he left the turnout, before the accident, and that he did not know at what rate of speed he was going just before, nor at what rate he was going when the car left the track. The turnout was about four hundred and fifty feet southerly of the bridge. The grade of the street running southerly from the Haverhill bridge fell about five and one tenth feet in one hundred and sixty-one feet, and then began to rise until, at the turnout, it was nearly level with the bridge. There was other testimony tending to show the danger of running rapidly over such a sunken joint. He also testified that there was a rule of the road that a motorman should "slow up" after leaving the turnout, and go on the Haverhill bridge at a low rate of speed. Sev-

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eral witnesses testified as to the rate at which the car was going at the time of the accident, and no one said that it was "slowed up" after leaving the turnout, but all agreed that it was going at the usual rate.

Upon the uncontradicted testimony we are of opinion that there was no evidence that the plaintiff was in the exercise of due care. He was not only running in violation of the rule of the road in failing to "slow up" at this point as he was about to pass over the bridge, but he was doing this when he had known for more than a month, from his experience in passing over this place, that there was a sunken joint at that point, which was liable to cause a car to leave the track and run against the bridge, as this car did. The jury would not have been warranted in finding that the plaintiff, with such knowledge as he had, was in the exercise of reasonable care when, in violation of the defendant's rule, he ran his car at its usual rate of speed over this sunken joint, in close proximity to the bridge.

Judgment on the verdicts.

ARTHUR L. LYNCH *vs.* LYNN BOX COMPANY.

Essex. November 5, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

If an inexperienced boy of nineteen, who is set at work in a box factory to cut pieces of wood for boxes upon a machine containing a circular saw revolving toward him, knows that a flat piece of metal, called a spreader, which is intended to enter the slit in the wood as the saw cuts it and prevent it from closing on the saw, owing to the screws that fasten it being loose, sometimes or "real often" fails to enter the slit and hits the wood, causing his hand to jump, it does not follow as matter of law that the boy appreciates and assumes the risk of his hand being thrown forward upon the saw when it is made to jump by a piece of wood hitting the spreader, and, in an action against his employer for injuries thus incurred, it is for the jury to say, taking all the circumstances into account, whether he appreciated the danger and assumed the risk.

In an action by a workman against his employer for personal injuries caused by a defect in a machine operated by the plaintiff, if the plaintiff testifies that he was operating the machine in the usual way when he was injured, this is evidence for the jury that he was in the exercise of due care.

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TORT for personal injuries received on October 3, 1902, while the plaintiff, in the employ of the defendant, was operating a machine known as a heading machine used in the manufacture of wooden boxes. Writ dated December 9, 1902.

In the Superior Court the case first was tried before *Lawton*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions, which were sustained by this court in a decision reported in 194 Mass. 307. There was a new trial before *Crosby*, J., who reported the case for determination by this court under the stipulation quoted in the opinion.

There was evidence at both trials that the plaintiff at the time of the accident was about nineteen years of age; that he was set at work at cutting pieces of wood for boxes upon a machine containing a circular saw revolving toward him, against which he was to push a movable table holding the piece of wood to be cut, while, attached to an adjoining stationary table about two inches back of the revolving saw, was a flat piece of metal called a spreader, intended to enter the slit in the wood as the saw cut it and prevent the wood from closing on the saw; that the screws attaching the spreader to the stationary table were loose, causing the spreader to go one way or the other; and that this defect had existed long enough to have been known to the superintendent of the factory; that the plaintiff was pushing a piece of wood on the movable table against the saw, when, owing to the looseness of the screws, the spreader failed to enter the slit in the piece of wood and struck the wood a little to one side of the cut, causing the piece of wood to be stopped with a violent jerk and the plaintiff's hand to be thrown forward upon the saw and injured. The difference between the evidence at the second trial and that at the first in regard to the plaintiff's previous experience and his knowledge of the condition and operation of the machine is described in the opinion.

R. Spring, (*W. Rand* with him,) for the defendant.

W. E. Sisk, (*J. H. & R. L. Sisk* with him,) for the plaintiff.

MORTON, J. This case was before this court in 194 Mass. 307 on the plaintiff's exceptions to a ruling directing a verdict for the defendant, and it was there held that the case should have been submitted to the jury. The case has been tried a second

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time and it comes before us now upon a report by the presiding judge made pursuant to a stipulation entered into by the parties at the close of the plaintiff's evidence that the jury should "return a verdict for the plaintiff in the sum of two thousand dollars and the case . . . be reported to the Supreme Judicial Court for its determination on the question whether upon the evidence presented there was an issue proper for submission to the jury." If there was, judgment is to be entered on the verdict. If there was not, judgment is to be entered for the defendant.

The defendant does not seriously contend that there was not evidence warranting a finding that the machine was defective, and that its condition was due to negligence on the part of the defendant. Neither does it seriously contend that the evidence did not warrant a finding that the accident was due to the defective condition of the machine. Its main contentions are that the risk was an obvious one and that the plaintiff assumed it, and was not in the exercise of due care.

The evidence, especially in regard to the plaintiff's knowledge of the condition and operation of the machine, is fuller than it was at the former trial, but it is not such, we think, as to warrant us in saying that there was no issue for the jury. The testimony in regard to the plaintiff's occupations before he entered the defendant's employment and as to what he did after he entered its employment down to the time of the accident was substantially the same as at the former trial. There was no testimony at this trial as there was at that from the defendant's superintendent that he instructed the plaintiff in regard to the operation of the machine, and the plaintiff's testimony that he received no instruction was left uncontradicted. The evidence at this trial tended rather to show that the plaintiff had worked less upon the machine than appeared to have been the case at the previous trial, and that his work upon it had been more intermittent and desultory. But the defendant contends that in view of the plaintiff's familiarity with the condition and operation of the machine as shown by his testimony at this trial, and in view of the fact that during the time that he worked upon the machine boards hit the spreader and caused his hand to jump "real often," to quote his words, he must be deemed to have understood that such an accident as occurred might happen

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and therefore to have assumed the risk, and it further contends that these facts render the case as now presented distinguishable from the case presented at the other trial. But it does not follow as matter of law that, because the plaintiff knew that the machine was defective and that boards at times hit the spreader and caused his hand to jump, he appreciated and assumed the risk of such an accident as happened. He might well have continued to work upon the machine without understanding or appreciating the fact that his hand was liable to be thrown on to the saw by the tendency which the machine had to make his hand "jump" when a board hit the spreader. His knowledge in regard to the machine and its operation would not necessarily preclude him from recovery. It was for the jury to say, taking all the circumstances into account, whether he appreciated the danger and assumed the risk. It could not be held that as matter of law he assumed the risk. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580. *Urquhart* v. *Smith & Anthony Co.* 192 Mass. 257. *Cahill* v. *New England Telephone & Telegraph Co.* 193 Mass. 415.

He testified that he was operating the machine in the usual way when injured and it could not be ruled, therefore, as matter of law that he was not in the exercise of due care.

Judgment on the verdict.

MARY A. HOYT *vs.* JOHN WOODBURY, trustee.

Essex. November 5, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Of one owning or controlling real estate.

It is not negligence on the part of one who owns a lot of land in a city, abutting upon a street with a considerable grade, to build thereon a four story block with two stores on the first floor opening upon the street with their entrance doors set back from it, and, between them, an entrance and hallway also set back from the street and leading to the upper floors of the building, and in so doing to leave the floor in front of the entrances open to the sidewalk and to make the floor of the entrance to the lower store three and a quarter inches lower than the floor of the entrance to the hall leading to the upper floors with a riser of that height

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between the two but with nothing to prevent persons from passing back and forth between the higher and lower portion of the flooring where the riser is, or to warn them of any risk in so doing; and, if a customer in the lower store, in leaving it and attempting to walk from the lower portion of the entrance floor to the higher, stumbles upon the riser and is injured, he cannot maintain an action against such owner.

TORT for injuries alleged to have been received by the plaintiff as she was leaving a store on Central Square in Lynn, leased by the defendant to one Bauer, by reason of her stumbling upon a raised portion of the floor of the store entrance. Writ in the Superior Court for the county of Essex dated April 17, 1905.

At the trial *Pierce*, J., directed a verdict for the defendant upon the facts which the plaintiff's counsel stated he relied on to maintain the action; and the plaintiff alleged an exception. The facts are stated in the opinion.

The case was submitted on briefs.

S. Parsons, H. A. Bowen & C. D. C. Moore, for the plaintiff.

W. H. Niles & H. R. Mayo, for the defendant.

RUGG, J. This is an action of tort to recover for injuries sustained by the plaintiff from a fall on premises of the defendant under these circumstances: For the purpose of trading she visited the store of one Bauer, who was a tenant of the defendant, in a four story block; the first story was occupied by two stores, between which was an entrance to the upper stories; the street in front of the block was at a considerable grade, Bauer's store being opposite the lower portion of the street; the front of the building was on the street line, but all the entrances were set back, that of Bauer's store about ten feet, and that to the upper stories about nine feet; the space between the street line (that is, between the line of the sidewalk adjacent to the building) and the entrances was paved by the defendant with alternate squares of black and white tiling; the space or passageway to Bauer's entrance was substantially level with the sidewalk, and in it stood, just inside the street line, a column about one foot square supporting the building; the passageway to the entrance to the upper stories was raised above the sidewalk and tiling leading to Bauer's store from two and one half to three and one fourth inches, and the line of separation between these two levels of tiling continued the diagonal line made by Bauer's show window to the sidewalk line; the plaintiff

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stumbled over this riser between the two levels of tiling as she was coming out of the store on a sunny afternoon.

Without discussing the plaintiff's due care or whether she had any greater right than Bauer, the tenant, would have had under similar circumstances, the ruling of the presiding judge directing a verdict for the defendant should be supported on the ground that there was no evidence of negligence on the part of the defendant. He owned a lot of land on a slight hillside, and it abutted upon a street which descended the hill. He had a right to improve his real estate in any reasonable way. He chose to maintain upon it a block with two stores separated by an entrance to upper stories. The problem which confronted him in doing this was so to arrange the means of access to these three entrances as to adapt them to the varying grade of the adjacent sidewalk. This could have been done in any one of several different ways. But it obviously must have been done in some way. So long as the present physical configuration of this Commonwealth continues to exist, substantially the same difficulties will confront those who undertake to erect structures for use of the public. Methods may change, and facilities of access may grow better, but the situation of buildings abutting upon hilly streets will abide. Persons entering this building were charged with knowledge that they were not entering from a perfectly level sidewalk, and that generally the floors of buildings are not of precisely the same elevation as the sidewalk, even where it is level. Customers entering or leaving stores cannot be unmindful of these almost universally prevailing conditions. Owners of buildings have a right to proceed in their constructions in view of this common observation on the part of the public and assume in the actions of those who may frequent their buildings the exercise of ordinary circumspection as to their footing. Steps of greater or less height are the usual, although not the only, means of overcoming such differences in level as existed in this case between the street and the entrance. People cannot expect upon land obviously in private ownership next a street the same condition that they might anticipate in a public sidewalk. In arranging an approach to the store wider at the street line and converging toward the door and the approach to the upper floors at a conveniently higher level with a low step in ordinary

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form between, the defendant violated no duty which he owed to the plaintiff. *Ware* v. *Evangelical Baptist Benevolent & Missionary Society of Boston*, 181 Mass. 285. *Lorenzo* v. *Wirth*, 170 Mass. 596.

Exceptions overruled.

COMMONWEALTH *vs.* JOSEPH V. BUCKLEY.

Suffolk. December 11, 1908. — January 4, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Obscene Literature.

At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, it is not necessary for the presiding judge to explain at length to the jury the meaning of the words "obscene," "indecent," "impure" and "manifestly," as these words are not technical terms but are common words to be understood in their common meaning by an ordinary jury.

At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, there is no error in giving to the jury the following instruction: "Obscenity means offensive to morality, to chastity, indecent, nasty. Impure explains itself. Language is offensive, impure and indecent when it manifestly tends to incite in the minds of people susceptible to such influences obscene thoughts, impure thoughts, indecent thoughts," and in giving no further definition of the words of the statute.

At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the defendant asked the presiding judge to instruct the jury that they had "a right to take into consideration other works of literature, religious, historical, or fiction widely read in the community, the language thereof, and the subjects discussed and the scenes and incidents described therein." The judge refused to give this instruction, and instructed the jury as follows: "It is entirely immaterial whether other books are as bad or worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; and it makes no difference whether you think there are other books in circulation worse than this or not; you are only trying this one." *Held*, that the request was refused rightly and that the language of the charge stated the law on the subject matter of the request accurately and sufficiently.

At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the defendant asked the presiding judge to rule that the jury had a right to consider the apparent intent and purpose of

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the story as a whole, and that whether the language referred to was such as was described in the indictment should be determined by consideration of the contents of the whole book. The judge refused to make these rulings in the form requested and instructed the jury that the defendant was being tried only with regard to such parts of the book as the government complained of, and that it made no difference what the object in writing the book was or what its whole tone was, if the pages complained of and the language set out in the bill of particulars were, in the opinion of the jury, obscene, indecent and impure, and manifestly tended to corrupt the morals of youth. He previously had instructed the jury that they must determine this question "from the language used and from such other parts" of the book as were "necessary to explain that language." *Held*, that the subject of the request was treated sufficiently in the charge, and that there was no error in the instructions given.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on February 8, 1908, under R. L. c. 212, § 20, charging the defendant with selling a certain printed book entitled "Three Weeks," containing in and upon certain pages certain obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, as set forth in specifications filed by the Commonwealth.

In the Superior Court the defendant was tried before *Brown*, J. Before the jury were impanelled, the defendant filed a motion to quash the indictment, which is referred to in the opinion. The motion was denied by the judge, and the defendant excepted.

The whole of the book was introduced in evidence by the Commonwealth, and the sale of the book was admitted by the defendant. The only other testimony introduced by the government was the reading of the portions of the book specified in the indictment and set forth in the Commonwealth's specifications. The defendant introduced no evidence. At the close of the evidence the defendant asked the judge to rule and instruct the jury as follows:

1. Upon all the evidence the jury should return a verdict of not guilty.

2. Upon all the evidence the language of the parts of the book referred to in the indictment have not been shown to be obscene.

3. The language of the parts of the book described in the indictment is not indecent.

4. The language of the specified parts of the book in evidence is not impure.

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5. The portions of the book referred to in the indictment do not manifestly tend to the corruption of the morals of youth.

6. The word "manifestly" as used in R. L. c. 212, § 20, means that the language complained of must be such as obviously, clearly and incontrovertibly would corrupt the morals of youth.

7. The jury must be convinced beyond any reasonable doubt that the book is either obscene, indecent or impure, or manifestly tends to corrupt the morals of youth. If they are not so convinced they should return a verdict of not guilty.

8. The jury should treat the book as a whole, and determine whether the book as a whole is obscene, indecent or impure, or manifestly tends to the corruption of youth.

9. Language is not obscene unless it is calculated to deprave the morals of the ordinary reader or leads to impure purposes.

10. It is not sufficient that the jury be satisfied that the book might seem obscene, indecent and impure to some persons. It is necessary that they be satisfied that it is obscene, indecent and impure to the mind of the ordinary reader into whose hands it would be likely to fall.

12. Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals.

13. Manifestly means that which is clear and requires no proof; that which is notorious.

14. The word "manifestly" as used in the indictment means clear and requiring no proof, incontrovertible, admitting no dispute.

15. The parts of the book referred to in the indictment do not "manifestly tend to corrupt the morals of youth" unless it is so apparent to the jury that it has that tendency as to require no explanation or proof.

16. If the jury believe that there might well be an honest difference of opinion among reasonable men as to whether or not the language of the parts of the book referred to in the indictment tends to corrupt the morals of the youth, they cannot find that such language "manifestly" has that tendency.

17. It is not enough that the jury find that the parts of the book referred to are indelicate or offensive to good taste, or do

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not agree with the sentiments of a majority of the people upon the question of morals.

18. The parts of the book referred to in the indictment are not within the provisions of R. L. c. 212, § 20, merely because the jury may believe that they may be indelicate or offensive to the sentiments of a portion or even the whole of the community.

19. The jury cannot find that the parts of the book referred to in the indictment violate the provisions of R. L. c. 212, § 20, merely because they in language or ideas do not accord with the standard of morals of a majority or the whole of the people.

21. The jury have a right to consider the whole of the contents of the book in determining whether the parts specifically pointed out in the indictment come within the provisions of R. L. c. 212, § 20.

22. The jury have a right to consider the apparent intent and purpose of the story as a whole in determining whether the parts referred to come within the description of the indictment.

23. Whether the language referred to is such as is described in the indictment should be determined by consideration of the contents of the entire book.

25. The jury have a right to consider whether the production as a whole is put forward as legitimate literature, and whether the story offers a fairly typical study of life. If they so find, then, even though it may contain episodes which, although within the description of the indictment, taken by themselves are subsidiary to the larger purpose of the book, their verdict should be not guilty.

26. In determining whether the parts of the book referred to in the indictment come within the provisions of R. L. c. 212, § 20, and their probable influence and effect upon the mind and morals of those into whose hands the book may fall, the jury have a right to take into consideration other works of literature, religious, historical, or fiction widely read in the community, the language thereof, and the subjects discussed and the scenes and incidents described therein.

The judge refused to rule and to instruct the jury as requested, and instructed the jury as follows:

"This defendant is charged with selling a certain printed book which contains, in the language of the indictment, certain

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obscene, indecent and impure language, manifestly tending to the corruption of the morals of youth. That is the charge upon which he is tried. The issue is very simple. It is for you to determine whether in your opinion this language is obscene, impure or indecent, and manifestly tends to the corruption of youth. The allegation in the indictment that the language is so bad that it ought not to be set out, is not to be considered by you at all, because you have the language itself, and it is from that you must form your conclusions. The language of the pleader is not to be considered by you at all.

"Now, what does the statute mean? This statute was intended to protect public morals, particularly the morals of that part of the public who, by reason of tender age or any other reason, have minds open, susceptible to influences of this sort. You are to determine from the language used, and from such other parts as are necessary to explain that language, whether that is obscene and impure, and whether it manifestly tends to the corruption of youth.

"Now, language to be obscene — perhaps you know as well without my trying to explain it as you will afterwards — but obscenity means offensive to morality, to chastity, indecent, nasty. Impure explains itself. Language is offensive, impure and indecent when it manifestly tends to incite in the minds of people susceptible to such influences obscene thoughts, impure thoughts, indecent thoughts. Is it language which has a tendency in your opinion to incite impure thoughts in the minds of people into whose hands it may come? Does it corrupt their morals? Does it excite their sexual passions? Now, the fact is not whether it tends to excite those feelings in your minds or not, but whether it has a tendency, a manifest tendency, to excite those feelings in the minds of youths into whose hands it might come. . . . Does it have that tendency? Does it have a manifest tendency? Are you able by taking the language and reading it to say that it manifestly tends to corrupt the morals of youth? If you cannot say that, it makes no difference what anybody else thinks about it, and you must return a verdict of not guilty. If you have reasonable doubt about it you must return a verdict of not guilty.

"It is entirely immaterial whether other books are as bad or

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worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; and it makes no difference whether you think there are other books in circulation worse than this or not; you are only trying this one. It makes no difference what the object in writing this book was, or what its whole tone is, if these pages that are complained of, the language that is set out in the bill of particulars, is in your mind obscene, impure, indecent, and manifestly tending to the corruption of youth, then you must find a verdict of guilty. It is for you to say. You are to use your own experience and your judgment, acting under the responsibility of your oaths, and return such a verdict as you think you ought to. If you have any doubt, reasonable doubt, as to the effect of this language upon the minds of youth, or anybody else into whose hands it may come, then you must give the defendant the benefit of that doubt."

The jury returned a verdict of guilty, and the defendant was sentenced by the judge to pay a fine of $100 and to stand committed until the sentence was performed. On motion of the defendant, the judge filed a certificate that in his opinion there was reasonable doubt whether the sentence should stand, and ordered that the execution of the sentence be stayed until the further order of the court. The defendant alleged exceptions which were allowed by the judge.

The case was submitted on briefs.

F. H. Chase & H. A. Guiler, for the defendant.

I. Isaacs, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. This is an indictment under R. L. c. 212, § 20, charging the defendant with selling "a certain printed book" which contained "certain obscene, indecent and impure language, and manifestly tending to the corruption of the morals of youth." The case is before us upon the defendant's exceptions to the overruling of the motion to quash the indictment and to the refusal of the judge to give certain rulings requested at the trial. It is stated in the defendant's brief that the questions raised in the motion to quash, so far as now relied upon, are covered in his request for rulings. We therefore shall consider that motion no further, but shall pass at once to the questions of law which

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arise out of the refusal to give the rulings requested at the trial.

There were twenty-six requests, none of which was given in the language asked for, although the law contained in some of them, so far as material to the case, was adopted by the judge in his charge. It seems best to treat the question in a topical way rather than to speak of the requests individually. This is substantially the way in which the questions are discussed upon the defendant's brief.

The defendant strongly contends that the judge should have defined at greater length than he did the terms "obscene," "indecent," "impure" and "manifestly." While it is true perhaps that by illustration or the use of synonyms the judge might have explained more fully the meaning of these terms, still it is to be remembered that they are not technical terms. They are common words and may be assumed to be understood in their common meaning by an ordinary jury. So far as the judge undertook to define we see no error, and we cannot say as matter of law that his failure to define more at length was erroneous in law or prejudicial to the defendant.

It is strongly contended by the defendant that the language complained of is neither obscene nor indecent nor impure, and that it does not manifestly tend to the corruption of the morals of youth; and in support of his contention the following language is used in his brief:

"The language of those parts of the book specified in the indictment is neither impure nor indecent within the meaning of the statute. No word, sentence or paragraph can be pointed out which can be described by either of these terms. If the statute is to be construed to cover all language which conveys or suggests thoughts of sexual relations, or even illicit intercourse, it will certainly include a great part of what is considered good and decent literature. Indecent and impure language cannot be such as is widely read and openly discussed. The very terms themselves import that matters thus described cannot be openly read or decently discussed; yet it is submitted that the book in question can be widely and openly read and discussed without causing general corruption of morals or denoting general depravity.

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"The language referred to does not manifestly tend to the corruption of youth. It is not sufficient, under this clause of the statute that the language be such as might tend to corrupt the thoughts of the young. It must obviously and incontrovertibly have that tendency. If there is any room for doubt upon that point the statute does not apply. The language of this book is not such that it can properly be said 'manifestly' to tend to corrupt or deprave."

But we think that the case was properly submitted to the jury. It could not be ruled as matter of law that the jury could not find the book within the prohibition of the statute. In prosecutions like this, considerations similar to those thus urged in this case are frequently, if not usually presented, in behalf of the defendant, and they are entitled to consideration. But after all there is a practical side. Doubtless an artist, when looking in his studio upon the model before him, in the figure of a perfectly formed young woman standing completely nude, may be so much under the influence of the aesthetic principles of his profession, and so intent in his wish to copy with perfect exactness the living picture, as not to have one obscene, indecent or impure thought or the slightest sexual desire, but on the contrary he may be perfectly absorbed in the purest feeling of admiration and wonder at the artistic beauty of the creation before him. But it by no means follows that if he should open wide the doors of his studio and fill it with people from the crowded streets, they would be moved by the same lofty and pure feelings. And in passing upon the question whether such an exhibition was obscene or tended to corrupt the morals of youth, a jury would not be justified in considering only the feeling of the artist. They should consider that not every person is so much absorbed in the artistic features, and that the exhibition of such a model may rather arouse in many spectators passions of a merely animal nature.

And so a reader may be so interested in the development of the character of a woman — no matter how wanton — as a merely psychic study, as to read such a book as this without a single impure or unworthy thought. And it may be that the author of this book was in full sympathy with such a state of mind when she wrote it and sent it forth to the reading

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public. It may be also that the literary style of the book is such that many a reader finds that to be the most attractive feature; and the thinly veiled allusions to an intense desire for sexual intercourse and to the arts of seduction leading to it and exciting it may be unheeded by him. But such an author cannot expect that the reading public as a whole will so read her production. Descriptions of seductive actions and of highly wrought sexual passion, even when sanctified by what the author has called "love," are very likely to be seen in another light tending towards the obscene and impure. And an author who has disclosed so much of the details of the way to the adulterous bed as the author of this book has and who has kept the curtains raised in the way that she has kept them, can find no fault if the jury say that not the spiritual but the animal, not the pure but the impure, is what the general reader will find as the most conspicuous thought suggested to him as he reads.

The twenty-sixth request was properly refused; and the language of the charge sufficiently and accurately stated the law on the subject matter of this request. Although the twenty-first, twenty-second and twenty-third rulings were not given in their precise language, yet their subject was sufficiently treated in the charge. We see no error in the manner in which the court dealt with any of the requests.

Exceptions overruled.

HARLOW H. ROGERS *vs.* CITY OF LYNN.

Essex. November 4, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Tax, Redemption, Sale, Payment. *Statute*. *Contract*, Implied in law. *Words*, "Owner."

One who purchased real estate at a sale under St. 1888, c. 390, § 40, now R. L. c. 18, § 41, for the collection of a tax due to a city, thus became an "owner" of the real estate and entitled under St. 1888, c. 390, § 57, now R. L. c. 18, § 58, to redeem it from taxes assessed in years previous to the time when he became such purchaser, at sales for the collection of which the city, under St. 1888, c. 390, § 48, had become the purchaser.

One who, after having become the purchaser of certain real estate from a city at a

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sale under St. 1888, c. 390, § 40, for the collection of taxes for 1898, pays to the city an amount due for taxes assessed upon the same real estate for several years previous to 1898 and for other charges accruing to the city because of sales for the collection of such prior taxes, at which the city had become the purchaser under St. 1888, c. 390, § 48, and receives from the city without any sale under St. 1888, c. 390, § 66, a deed purporting to convey to him all the right, title and interest which the city had received as purchaser under the prior sales, cannot recover from the city the money so paid on the ground that there was a failure of the consideration for which it was paid, since by the making of such payment he was benefited by having the premises released from the liens which the city had thereon to secure the payment of the prior taxes.

CONTRACT against the city of Lynn to recover certain sums paid to the defendant for deeds of two parcels of land held by it as purchaser at sales of the premises under St. 1888, c. 390, § 48, for the collection of taxes. Writ in the Superior Court for the county of Essex dated November 9, 1904.

The case was heard by *Fessenden*, J., upon an agreed statement of facts. The following of the facts agreed upon are material:

In 1896, 1897, 1898 and 1899 the defendant, under St. 1888, c. 390, § 48, became the purchaser in the name of its collector at properly conducted sales of real estate of one Elliott to collect taxes assessed for each of the years, 1894 to 1897, inclusive. In September, 1900, the plaintiff became a purchaser at a sale conducted by the collector of the defendant for taxes for 1898, and received and recorded a properly executed tax deed. In October, 1900, the plaintiff received and recorded a deed without covenants, signed, sealed, executed and delivered in behalf of the defendant by its mayor, and purporting to convey to the plaintiff all the right, title and interest which the defendant had acquired under the four tax deeds preceding the plaintiff's. For this latter deed the plaintiff paid "to the defendant and the defendant appropriated to its own use" $176.84, "which was the amount due" the defendant "under the four prior tax sales."

Similarly, the defendant sold to the plaintiff in 1901 real estate of one Walker at a tax sale for the collection of taxes for 1899, and in the same year gave to him a release deed without covenants, signed, sealed, executed and delivered in the name and in behalf of the defendant by its mayor and purporting to convey to the plaintiff all right, title and interest acquired by the defendant under previous tax sales of the same premises at

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which it had become the purchaser under St. 1888, c. 390, § 48. For the last named deed the plaintiff paid "to the defendant" and the defendant appropriated to its own use $862.51, "which was the amount due the city . . . under the said four tax sales."

There had been no sale of either the Elliott or the Walker property under St. 1888, c. 390, § 66, before the purported conveyance by the defendant of its right, title and interest gained as a purchaser at the previous tax sales.

The plaintiff sought to recover the sums of $176.84 and $862.51, paid for the "release deeds" of the city to him, contending that such deeds were valueless.

The presiding judge found for the defendant and the plaintiff appealed.

The case was submitted on briefs.

N. D. A. Clarke, for the plaintiff.

A. G. Wadleigh, for the defendant.

MORTON, J. In each instance before he paid the taxes which he now sues to recover back, the plaintiff had become the purchaser at a tax sale of the premises on which the taxes that he paid had been assessed, and had received from the collector deeds in proper form duly acknowledged which he had caused to be regularly recorded. In other words, by virtue of the tax deeds he had become the owner of the two parcels subject only to the liens which the defendant had for prior taxes, and to the right of the former owner to redeem. *Butler* v. *Stark*, 139 Mass. 19. *O'Day* v. *Bowker*, 143 Mass. 59, 62. *Perry* v. *Lancy*, 179 Mass. 183. As such owner we think that he was entitled to redeem the premises by the payment of the prior taxes to which they were still subject in the defendant's favor. The language of the statute is broad enough to include any kind of ownership and has been, in effect, so construed. *Hillis* v. *O'Keefe*, 189 Mass. 139. In order to redeem, the person seeking to redeem must be the owner, but we see no reason for limiting the right of redemption, as between one who seeks to redeem and the city, to the person who was the owner at the time when the tax, from which redemption is sought, was assessed. It has been distinctly held that the right of a mortgagee to redeem is not limited to one who was such at the time when the tax was assessed. *Barry* v. *Lancy*, 179 Mass. 112, and cases cited. The

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plaintiff could not have redeemed from the taxes for which the parcels were sold to him because he was not then, in any sense, an owner. Neither, for the same reason, could he have redeemed at the time when the premises were sold for the prior taxes. But, when he became an owner by purchase at the tax sale, we do not see why the rights of redemption from prior taxes did not attach, by virtue of the statute, to his ownership, as well as to that of one who was an owner when the taxes were assessed.

But, however that may be, and whether he was an owner or not within the strict meaning of the statute, the transaction between the plaintiff and the defendant must be regarded as operating as a payment of the prior taxes, even though the parties may have supposed that it was a purchase by or assignment to the plaintiff for a consideration equal to the prior taxes of any right or interest which the city had in the premises, and may have intended that it should have that effect. Whether the parties intended it or not, the receipt of the prior taxes by the defendant released the premises from the liens which it had thereon to secure their payment and therefore operated as a payment of such taxes. To that extent, whatever the exact nature of the plaintiff's interest in the property conveyed to him, he was benefited by the release which he received, and the case is not, therefore, one of a total failure of title or of consideration.

Judgment affirmed.

WILLIAM HARRIGAN *vs.* EBEN DODGE.

Essex. November 5, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Equity Jurisdiction, Specific performance. *Frauds, Statute of. Equity Pleading and Practice*, Bill.

It is not necessary for the plaintiff in a bill in equity, seeking specific performance of an agreement by the defendant to convey certain real estate to him, to allege that the defendant owned the real estate which he had agreed to convey.

A bill in equity, for the specific performance of an alleged agreement by the defendant to convey to the plaintiff certain real estate described at length in the bill, set forth as memoranda of the agreement two receipts, one signed by an agent of the defendant for $100 "on account of sale of the three houses belong-

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ing to the F. D. estate in Danvers," and the other signed by the defendant for $25 "on acct. of sale of the three houses & land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate." There was no allegation that the three houses referred to in the memoranda were the only ones owned by the F. D. estate in Danvers. The defendant demurred on the ground that the memoranda were not sufficient to satisfy the statute of frauds, R. L. c. 74, § 1, cl. 4, the demurrer was sustained and the plaintiff appealed. *Held*, that the demurrer was sustained rightly, since the descriptions contained in the memoranda were not sufficiently definite and there was no allegation in the bill to make them more so.

BILL IN EQUITY, filed in the Superior Court for the county of Essex on June 13, 1907, seeking specific performance of an alleged agreement to convey certain real estate.

The defendant demurred, alleging the grounds for demurrer stated in the opinion. *Crosby*, J., sustained the demurrer and dismissed the bill. The plaintiff appealed.

The facts alleged in the bill are stated in the opinion.

D. N. Crowley, for the plaintiff.

F. L. Evans & J. F. Quinn, for the defendant, submitted a brief.

RUGG, J. This is a bill in equity brought to compel the defendant to convey a certain tract of land in Danvers. It alleges that the plaintiff entered into a contract with the defendant, through his agents, Allen and Tebbetts, to buy certain land described at length in the bill, and that a memorandum thereof in writing was signed as follows: "Received from one William Harrigan One Hundred Dollars on account of sale of the three houses belonging to the Frances Dodge estate in Danvers. $100 Allen & Tebbetts," and another memorandum of the tenor following: "Received of A. G. Allen twenty-five dollars ($25.00) on acct. of sale of the three houses & land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate. Eben Dodge, Agent." There are further sufficient averments as to the precise price to be paid and the plaintiff's readiness to pay and refusal of defendant to deliver a deed. The defendant demurs on the grounds, first, that the bill sets forth no sufficient memorandum signed by him to satisfy the statute of frauds; and, second, that the bill does not allege that the defendant is the owner of the premises.

The second ground of demurrer may be briefly disposed of, for the reason that such an allegation is unnecessary. The defendant may have made a contract, by which he became liable to this suit, without having been the owner of the real estate.

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It is matter of defense to the prayer for specific performance, if he is unable to perform his contract on account of lack of ownership, and not a fatal defect apparent upon the statement of the plaintiff's claim.

The first ground of demurrer raises chiefly a question of pleading. The descriptions contained in the two memoranda may or may not turn out to be sufficient to point to any particular houses. Standing alone without further allegations, they are equivocal. The purpose of the statute of frauds in this regard requires the memorandum to contain a description of the land sufficient for purposes of identification, when read in the light of all the circumstances of ownership of the property by the vendor. These memoranda might be sufficient if three houses and the land within their several curtilages were the only real estate owned by the Frances Dodge estate in Danvers. If, however, it should appear that the Dodge estate owned more than three houses in Danvers, then the description contained in the two writings is not enough to satisfy the statute of frauds. *Whelan* v. *Sullivan*, 102 Mass. 204. *Clark* v. *Chamberlin*, 112 Mass. 19. *Doherty* v. *Hill*, 144 Mass. 465. All these attendant circumstances may be shown outside the writing and by parol for the purpose of interpreting and applying the memorandum. *Mead* v. *Parker*, 115 Mass. 413. The question presented here is one of pleading, and not what might be sufficient after verdict in view of identifying evidence. The writings themselves being not certain on their face, and being open to the possibility of becoming wholly indefinite, it was necessary for the plaintiff to allege facts sufficient to state a case clearly, which called for specific performance, by setting out in substance that the three houses referred to in the writings were the only ones owned by the Dodge estate in the town. Having failed to do this, the demurrer was properly sustained. The case is governed by *Miller* v. *Burt*, 196 Mass. 395. It is plainly distinguishable from *Slater* v. *Smith*, 117 Mass. 96, relied upon by the plaintiff, in that the memorandum under discussion in the latter case by definite and clear physical and financial ear marks identified the houses. The decree sustaining the demurrer and dismissing the bill must be affirmed.

So ordered.

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CHARLES MATTSON *vs.* AMERICAN STEEL AND WIRE COMPANY OF NEW JERSEY.

Worcester. November 6, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, In factory yard.

At the trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ and to have been caused by negligence on the part of a superintendent of the defendant, it appeared that the injury to the plaintiff was caused by the collision in the defendant's factory yard, which covered a large space and contained a network of tracks, of an engine, upon which the plaintiff was, with a car placed on the track by orders of one L., and there was evidence tending to show that L. and L. only gave orders to the other men in the yard, eight in number, that he got twenty-five cents a day more pay than they did, that occasionally, "when he did not have anything else to look after," he worked with his hands, and that he received directions from another person, not the defendant, written on pieces of paper, stating that certain designated material in the yard was to be moved to certain designated places in the factory. *Held*, that there was evidence which would warrant a finding that L. had entire charge and superintendence of the department of distribution of materials in the yard, and that superintendence was his principal duty, and therefore that he was a person for whose negligence causing injury to an employee the defendant would be liable under R. L. c. 106, § 71, cl. 2.

At the trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, it appeared that at the time of the alleged injury the plaintiff was employed as lookout on a narrow gauge switching engine in the yard, that the yard was extensive and contained a network of tracks, both narrow gauge and broad gauge, that the superintendent of the yard, under whom the plaintiff worked, sometimes directed that a car be moved by hand, but that, whenever he did so, he notified the engine crew; that the accident which caused the plaintiff's injury occurred at ten o'clock at night and was a collision between the engine upon which the plaintiff was and a car which by the superintendent's order had been moved by hand upon the track where the engine was working, but of which the superintendent had failed to notify the engine crew. *Held*, that there was evidence of negligence of the superintendent, and that the injury was not one of which the plaintiff had assumed the risk.

At a trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, it appeared that the plaintiff was injured while on the foot board of a narrow gauge switching engine in the yard of the defendant acting as a lookout, that the yard was extensive and contained a network of tracks, that the engine, on which the plaintiff was, came into collision with a car which had been put on the track by hand by order of a superintendent of the defendant who negligently

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had failed to inform the plaintiff of that fact, that a few minutes before the collision the plaintiff on the engine had been by the same point where the collision occurred and had observed that the car was not on the track where it was when the collision occurred, that the superintendent was accustomed to inform the engine crew when a car was moved in the yard by hand, and that the accident occurred at ten o'clock at night. *Held*, that the question, whether the plaintiff when injured was exercising as much care as he should have exercised under the circumstances, was for the jury.

TORT under R. L. c. 106, § 71, cl. 2, for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant and to have been caused by negligence on the part of a superintendent of the defendant. Writ in the Superior Court for the county of Worcester dated December 22, 1906.

The case was tried before *Dana*, J. There was evidence tending to show that, when injured, the plaintiff was riding on the foot board running across the back of a narrow gauge switch engine owned and controlled by the defendant, his duties being those of a lookout; that as the engine was backing down a track at about ten o'clock at night, it came into collision with the end of a car which had been pushed back over a switch on to the track upon which the switch engine was approaching, and the plaintiff was injured; that the car was thus placed by orders of one Locks, whom the plaintiff contended was a superintendent of the defendant, and that Locks should have warned the plaintiff of the position of the car, but did not do so.

There also was evidence tending to show that Locks and Locks only gave orders to the plaintiff and other men in the yard, generally about eight in number, that he got twenty-five cents a day more pay than the others, that he worked with his hands with the other men when he did not have anything else to look after, and that he received directions from Hartman, the "stock chaser," written on a slip of paper, as to what material he should get and where he should deliver it.

Other facts are stated in the opinion.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged an exception.

V. E. Runo, for the plaintiff.

F. F. Dresser, for the defendant.

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KNOWLTON, C. J. The defendant is the proprietor of an important manufacturing business in Worcester, and its yard covers a large space upon which are broad gauge tracks for railroad cars and an extensive net work of narrow gauge tracks over which bucket cars are run by dummy engines. Bucket cars are eight feet long and four feet high, built with a platform that carries three iron boxes or buckets, which are unloaded by lifting the buckets from the platform and dumping their contents into the steel furnaces. One Hartman, called a stock chaser, received a list of the different kinds and amounts of material that were needed for the steel furnaces, and he then gave direction to one Locks, who was in charge of the cars and commanded the users of them, the scrap yard engine crew, to take the requisite number of bucket cars to the proper places to be filled, and to make distribution of the quantities that he was called upon to supply. The jury well might have found that Locks had the entire charge and superintendence of the business of getting these various kinds of material, called for by Hartman, from the different places where they were kept, and delivering them to the furnaces where they were needed, and that this superintendence was his principal duty. He and his crew were busy loading and unloading, using bucket cars for the delivery of the property. The plaintiff was going about the yard from place to place upon different tracks, with a dummy engine, moving these bucket cars to be loaded and unloaded. The accident happened at ten o'clock at night, from a collision of the engine with a corner of a bucket car which had been standing with others on the next track parallel to that on which the engine was moving, but had been pushed down by hand upon a switch track crossing over to the other, so far that a corner and a part of its side projected over the line of passage of cars and the engine on the other track where the engine was running. Such cars were frequently moved short distances by hand, in connection with loading and unloading, but there was testimony that when they were so moved Locks usually informed the engine crew of it. This car was moved by Locks a short time before the accident, but the engine crew did not know it. Because the regular engineer was away and the acting engineer was not familiar with the yard, the plaintiff was employed as a

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lookout, and was riding on the foot board at the rear of the engine, which was going backward when the collision occurred. The jury might have found that Locks was a superintendent of this department of distribution, and was guilty of negligence in moving this car as he did without afterwards informing the plaintiff what he had done. While the plaintiff was expected to look out for cars and other obstacles as the engine moved about, the jury might have found it to be negligent for Locks greatly to increase the risk in a place where the plaintiff, from his observation and knowledge of conditions a few minutes before, had reason to believe that the track was clear. The lights and shadows in the night time made it far more difficult to discover the exact position of the bucket cars than it would have been in the daytime.

We are also of opinion that it was a question for the jury whether the plaintiff was in the exercise of due care. There was much to show that he was not so vigilant as he ought to have been. The engineer testified that he and the plaintiff were talking together, and while he said in general that they were both looking forward, there were indications in his testimony that the plaintiff was not looking carefully. But the plaintiff denied that he was talking with the engineer, and testified that just before the accident he was looking forward to see if the track was clear. We are of opinion that the question whether he was exercising as much care as one ought to exercise under such circumstances was for the jury to determine as a matter of fact.

Exceptions sustained.

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MICHAEL BOWLER *vs.* PACIFIC MILLS.

Essex. November 6, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Toward licensee, Of one owning or controlling real estate. *Way*, Duty of owner of private way open to public.

A landowner, who for the purposes of his business constructs a street over his land, which remains a private way but from which it is impracticable to exclude the public without interfering with his own convenient use of the way, and who posts and maintains notices at different places where public streets open into his private street, indicating that it is a private way, does not invite the public to use his private street but merely permits them to do so, and his only duty to travellers on his street is not to injure them intentionally or wantonly.

TORT for personal injuries sustained by the plaintiff from being run over by a private freight train of the defendant, consisting of an engine and two cars, while the plaintiff was travelling on a bicycle over a railroad crossing maintained by the defendant on Canal Street in Lawrence. Writ dated January 22, 1906.

In the Superior Court the case was tried before *Sanderson*, J. The following facts were not disputed:

The defendant at the time of the accident was the owner of the fee in a way in Lawrence called Canal Street, which was a private way in the sense that it was not accepted by the city as a public highway. Canal Street ran east and west along the north bank of the North Canal and was about a mile in length. The westerly limit of Canal Street was at its intersection with Broadway. Union Street crossed Canal Street at a point some distance east of Broadway. Broadway and Union Street were public highways running north and south.

The defendant was the owner of a mill on the south bank of the North Canal near Broadway and of dwelling houses, storehouses, chemical works and other property on the north side of Canal Street near Broadway. A large storehouse of the defendant was on the northeast corner of Canal Street and Broadway,

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and the defendant built and maintained a railroad from this storehouse across Canal Street and over a railroad bridge to its mill on the south side of the North Canal. The crossing was built at grade with planks between and outside the rails. The distance from the westerly rail of the crossing on the south side of Canal Street to the sidewalk on Broadway was twenty feet and on the north side about thirteen feet. At the place of the accident, Canal Street, not including the sidewalk, was about forty feet wide; it was a gravel street with a brick sidewalk about ten feet wide on the north side.

It also was undisputed that the train which was passing over this crossing at the time of the accident was being operated by the defendant, and that a man who caught hold of the plaintiff and caused him to fall from his bicycle was the conductor of the train and an employee of the defendant.

The substance of the evidence on the only issue material to the decision is stated in the opinion. At the close of the evidence, the judge ruled that upon all the evidence the plaintiff was not entitled to recover. He ordered a verdict for the defendant, and reported the case for determination by this court, it being agreed by the parties that if his ruling was wrong the case should stand for trial in the Superior Court upon the issue of damages only. Otherwise, judgment was to be entered for the defendant.

W. J. Bradley, (*A. X. Dooley* with him,) for the plaintiff.

J. P. Sweeney, for the defendant.

KNOWLTON, C. J. The question principally argued in this case is whether the plaintiff was travelling on Canal Street by invitation of the defendant, or merely as a licensee. The street was laid out and constructed by the defendant, over its own land, for its own purposes, and it has been very largely used by its employees and others, in connection with the business carried on in its mills. The testimony was uncontradicted that it would be impracticable to exclude the public from the street without interfering with the convenient use of it by the defendant and others in the defendant's business. Notices have been posted and maintained at different places where other streets open into it, indicating that it is a private way. Upon the authorities, it must be held that the very extensive use of the

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street by the public has been only permissive, and that members of the public, while on the street, have only the rights of licensees. *Moffatt* v. *Kenny*, 174 Mass. 311. *Harobine* v. *Abbott*, 177 Mass. 59. *Weldon* v. *Prescott*, 187 Mass. 415. *Reardon* v. *Thompson*, 149 Mass. 267. *Redigan* v. *Boston & Maine Railroad*, 155 Mass. 44. *Stevens* v. *Nichols*, 155 Mass. 472. In *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, there was, in addition to the construction of the crossing, an invitation by the signal of the flagman. The grounds of distinction between *Murphy* v. *Boston & Albany Railroad*, 133 Mass. 121, *Hanks* v. *Boston & Albany Railroad*, 147 Mass. 495 and *Sweeny* v. *Old Colony & Newport Railroad*, *ubi supra*, and cases like the present, are pointed out in the three cases first above cited. It is that in these last cases there was an implied representation that the place was a public street which might be used with safety, and an inducement to use it as such, which inducement, like an express invitation, creates a duty to provide for the safety of the users. In the present case the public were informed by the notices along the street that this was a private way.

The measure of the defendant's duty to the plaintiff was to refrain from doing him an intentional injury and from wantonly or recklessly exposing him to danger. It might use the street and carry on its business and conduct its operations as it chose, so long as it did not transgress in this particular.

It is not contended that the injury to the plaintiff was inflicted intentionally or wantonly, and there is no evidence of a breach of duty on the part of the defendant.

Judgment on the verdict.

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JOHN LARSSON *vs.* METROPOLITAN STOCK EXCHANGE.

Suffolk. November 9, 1908.— January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Release. Deceit, By conduct without words. *Wagering Contracts.*

In an action, against a corporation called a stock exchange, under R. L. c. 99, §§ 4–6, to recover money paid on margins on wagering contracts, the only defense relied upon consisted of releases signed by the plaintiff, which the plaintiff contended were obtained from him by fraud. There was evidence that the plaintiff was a foreigner, sixty years of age, who for many years had been employed as a coachman and was inexperienced in business, that each of the releases was given in connection with the settlement of transactions between the parties in which a balance was paid to the plaintiff for which he receipted, signing his name at a shelf at the cashier's window, that the cashier placed on the shelf the contract with a receipt upon it containing a statement of the amount to be received by the plaintiff plainly written, while stamped also on the back of the contract by a rubber stamp dimly in fine print was the release, that the cashier in placing the paper before the plaintiff to sign put his hand over a part of the matter that was stamped on it, and that the plaintiff "supposed he was signing it for the money he got." There was evidence in regard to the manner in which the defendant conducted its business showing circumstances which the jury might find would lead the plaintiff naturally to believe that on each occasion when he signed a release the defendant was presenting a mere receipt for his signature. *Held,* that, although no untrue words were spoken to the plaintiff, there was evidence on which the jury might find that the plaintiff was induced to sign the releases by wilfully false representations made by the conduct of the defendant.

CONTRACT under R. L. c. 99, §§ 4–6, to recover money alleged to have been paid as margins upon wagering contracts for the purchase and sale of stocks. Writ dated October 8, 1903.

At the trial in the Superior Court before *Bishop*, J., the defense relied upon consisted of the releases signed by the plaintiff which are described in the opinion, where also the material portion of the instruction of the judge upon this subject is quoted.

The jury returned a verdict for the plaintiff in the sum of $1,913.50, and the defendant alleged exceptions.

G. F. Ordway, for the defendant.

O. Storer, for the plaintiff.

KNOWLTON, C. J. The only important question in this case is whether there was evidence to warrant the finding that the

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releases from the plaintiff, relied on by the defendant, were procured by fraud.

The action was brought, under the R. L. c. 99, §§ 4–6, to recover money alleged to have been paid by the plaintiff to the defendant as margins upon purchases and sales of stocks. It is conceded that the plaintiff's case would be made out, except for releases given by him to the defendant, covering the transactions relied on. The form of the releases is as follows:

"Boston 190

"Received of the Metropolitan Stock Exchange —— dollars, in full of all demands under within contract, and I hereby release and discharge the Metropolitan Stock Exchange, its officers, agents and servants and each of them therefrom, and also from any and all right of action, claim or demand under or by virtue of chapter ninety-nine of the Revised Laws of Massachusetts, or any amendment thereof, for any payment at any time heretofore made, or value or anything at any time heretofore delivered, either on within or any other contract or transaction whatever, and I covenant never to sue therefor, them or either or any of them.

"Witness my hand and seal the day and year above written.

"$ (L. S.)"

These releases were given in connection with the settlement of particular transactions between the parties.

The business of the parties was done under contracts on printed blanks issued by the defendant to the plaintiff, in one form of which the defendant offered to deliver to the plaintiff certain stock, at a stated price, and the plaintiff agreed to receive it, or, upon the surrender of the contract by mutual consent, the defendant was to pay the plaintiff a sum equal to the then advance in the market price of the stock. There were stipulations as to deposits, and other terms of the contract, with columns for entries, headed "Margin," "Accountant's Signature," "Date of Deposit," and "Stock Order Limit." Another form of contract was similar, except that in it the defendant promised to receive from the plaintiff certain stock at a stated price.

When the plaintiff desired to close the contract in one of

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these transactions the business was done in this way: The plaintiff applied to the cashier, who stood behind a small window with a little shelf eighteen inches wide in front of it, and told him he wanted to close the contract. After figuring the amount due him from his deposit, increased or diminished by the rise or fall in the price of the stock, the cashier placed the contract on the shelf at the window, with a receipt in the form quoted above on the back, in which the amount due the plaintiff was plainly written after the words: "Received of the Metropolitan Stock Exchange," and the same amount was plainly expressed in figures at the bottom, opposite the space for the plaintiff's signature. The body of the release, comprising all but the date and amount, was stamped on the back of the contract with a rubber stamp, in quite fine print, portions of which were very dim, and almost if not quite illegible to persons whose sight was not very keen. This was put before the plaintiff on the shelf for him to sign, and, upon his signing it, the amount of money named in it was paid him and the paper was retained by the cashier. The plaintiff testified that he only had the paper before him a moment, to sign, and did not read the release, but "supposed he was signing it for the money he got." The rubber stamp was put on the contract after the plaintiff asked to close it. He testified that he had to wait a while before they were ready for his signature, sometimes as long as ten minutes. He said that when he went to the window and wanted his money, the cashier would put the paper "out that way (illustrating by laying one of the contracts down on the shelf before him with his hand resting on it and covering part of the matter stamped thereon) for him to sign his name, and he would get the money if he signed his name."

The judge instructed the jury "that fraud is not mere misunderstanding, that it was not enough that a man should have signed one thing thinking it to be another, but that fraud is that circumvention, imposition and deceit, or getting around a man by words or acts fraudulent in their purpose, which operate as a deception upon his mind and entrap him; that a man is presumed to know the contents of what he signs; that fraud may be proved from acts and conduct as well as from declarations; and that deceit may take a negative form if it have the

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characteristics and effect of actual misrepresentation, and left it to the jury to say whether effectual fraud was practised upon the plaintiff, and whether he signed the papers under such circumstances that he was induced to sign them under a belief that they were simply releases for the money he received, instead of releases of the statute right of action." The evidence of fraud in this case is not strong. No untrue words were spoken to the plaintiff, and it is a question by no means free from difficulty whether there was evidence of conduct, intended to deceive the plaintiff, which would naturally tend to mislead him, whereby he was fraudulently induced to sign these papers in the belief that they were merely receipts for money due him. If the defendant had told him that they were only receipts and he had signed the releases relying upon the statements, there is no doubt that he could have avoided them on the ground of fraud. *Trambly* v. *Ricard*, 180 Mass. 259. *Freedley* v. *French*, 154 Mass. 339. *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447. In doing such business as this, where all the circumstances pointed only to the making of a receipt for the money paid, he would have been justified in taking the defendant's word, instead of waiting to attempt to decipher the dimly stamped words between the written statement of the amount at the beginning of the receipt and the figures giving the same amount at its end.

The first two cases cited above are applicable to facts like those now before us. Said Mr. Justice Colt in *Trambly* v. *Ricard*, at page 261, "The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendants that its terms did not differ from the terms of the sale agreed on. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations. . . . And any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect to produce such a belief to his injury, is a fraud."

The transaction in which the parties were engaged when the paper was signed was one that called for the payment of money and the giving of a receipt. All that was said and done between the parties indicated that the paper to be given was a receipt,

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and nothing more. At no time was there any reference to an arrangement or agreement which would justify the insertion of anything else than a receipt in the writing. The use of a stamp on the back of the contract might indicate to the plaintiff that he was signing a form of receipt which was regularly and properly used in all such transactions. The use of this stamp, taken in connection with the fact that the language impressed by it contained an important contract, about which nothing had been said and for which no consideration was given, and that the impression was difficult to read, might have another kind of significance. When we consider the manner in which the paper was presented for signature, and the plaintiff's lack of opportunity to read it unless he took it out from under the cashier's hand on the shelf and interrupted the regular method of doing the business, we see how the jury might have found a purpose, on the part of the defendant, to obtain the plaintiff's signature, without his knowledge that he was signing a release. The plaintiff was a Swede about sixty years of age, who had been employed many years as a coachman. The jury saw and heard him, and his counsel contends that they might have found him to be inexperienced in business and easy to be deceived. There were a variety of circumstances in the manner in which the defendant did this business, which the jury might find would naturally lead the plaintiff to believe on each occasion that the defendant was presenting a mere receipt for his signature, which circumstances were a representation by conduct that the paper was nothing but a receipt. They well might find that the plaintiff signed the paper in reliance upon this wilfully false representation.

We are of opinion that the case was properly submitted to the jury.

Exceptions overruled.

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FRED HARTLEY *vs.* SAMUEL ROTMAN.

Suffolk. November 9, 10, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Sale, Implied terms of.

An unqualified sale of goods by the person having possession of them includes an implied warranty of title or of the right to make the sale, and, if at the time of the sale the goods belonged to another who had not authorized their sale, the buyer may surrender the goods to their owner and recover the amount of the purchase money from the seller.

CONTRACT to recover damages for the alleged breach of an implied warranty of title in the sale of certain wool by the defendant, seeking under the first count to recover $199.35 as the value of 1643 pounds of wool, and under the second count to recover $579.81 as the value of 5271 pounds of wool. Writ dated March 26, 1906.

At the trial in the Superior Court before *White*, J., the plaintiff contended that both of these lots of wool, which he bought from the defendant, in fact belonged at the time of the sale to the Underwriters Salvage Company, a corporation, from which they had been taken wrongfully.

The defendant contended that he bought the first lot from licensed boatmen who had collected it while a certain pier was being rebuilt, and that he bought the second lot from one Feinberg, who had bought it from the Underwriters Salvage Company.

The plaintiff's agent testified to the purchase of the two lots from the defendant, the first on February 21 and the second on February 28, 1905; that the wool was saturated with water and filled with charcoal at the time, had a yellow and reddish cast and was similar to a sample produced in court; that it was sent to the Norton Cleaning Works; that the plaintiff later received notice that it was claimed by the Underwriters Salvage Company; that he communicated with the defendant, who asserted that he bought the wool as heretofore stated. The plaintiff surrendered the two lots of wool to the Underwriters Salvage Company.

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One Jones, the manager for the Underwriters Salvage Company, testified that the day after a fire, which occurred on pier No. 5 of the Boston and Maine Railroad on November 17, 1904, he took possession of all the property on the pier on behalf of the Underwriters Salvage Company; that the property consisted of cutch, red lead, pipe clay, rope, rags, wool and other articles; that he placed the actual work of salvaging the property under the supervision of one Daniels; that the witness had the exclusive control of authorizing the sales; that Feinberg, through whom the defendant claimed part of the wool, purchased certain lots of cotton waste, rope and rags piled up on the pier, but no wool, and that the witness authorized no sales of wool to Feinberg; and that so far as he knew no such sales were made to Feinberg or to any other person; that the witness subsequently went to the scouring factory at Norton, Massachusetts, and took from a lot of about five thousand pounds of wool in that factory a sample which was produced in court as above referred to, claiming it as the property of the Underwriters Salvage Company; that he identified the property as a part of the wool on the pier by reason of its mixture with pipe clay, its discoloration and its general texture and appearance; that when the salvage company left the pier, the witness investigated and saw that no wool was left on the pier or in the water under the pier, and that his men went through all the ruins to gather the wool.

Daniels, above referred to, testified that he superintended the work on the pier for the Underwriters Salvage Company; that the men got all the wool, and took it to the office of the Underwriters Salvage Company; that he made the sales in person, after getting authority from Jones; that he made sales of cotton waste, rope and rags to Feinberg, but sold him no wool or refuse piles, and that he went over to the pier until the middle of January to secure any property which might turn up. One Jenkins corroborated Daniels. These three witnesses all testified that whenever Feinberg removed property there was present some representative from the Underwriters Salvage Company who saw that he took only the property purchased and that he took no wool, and that no wool was, with their knowledge, taken by any person. The plaintiff introduced the testimony of one Talbot, the owner of the scouring factory, who testified that the lot of

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wool from which the sample was taken by Jones was the same lot of wool received from the plaintiff.

One Hobbs, the fourth vice-president of the Boston and Maine Railroad, testified that he had charge of insurance matters and goods damaged by fire while in the possession of the Boston and Maine Railroad. He testified, against the defendant's objection, without showing authority in writing, that he had full control of the property in the warehouse on the morning of the fire. To this the defendant excepted. He further testified that on the day of the fire he made arrangements with the Underwriters Salvage Company to take possession of all the property on the pier and to make returns to the Boston and Maine Railroad.

He further testified, on cross-examination, that the pier was used by steamship companies to land their freight, under an arrangement with the Boston and Maine Railroad; that the pier was used as a warehouse for such goods until shipped to their destination or delivered in Boston; that the pier also was used for outgoing goods which had been discharged from the Boston and Maine cars and were destined for shipment by steamer; that when such goods are delivered at the warehouse they go into the possession of the steamship company; that incoming goods discharged from steamers do not go into the possession of the Boston and Maine Railroad unless they are delivered to it for transfer, except that the Boston and Maine Railroad had a certain care over the premises and furnished patrolmen for them, and could not escape liability if it allowed those who had business on the piers to come and take away the goods which had been discharged from the steamship company. The witness could not tell what portion of the wool on the wharf was destined for Boston parties, or what was to be shipped further for the Boston and Maine Railroad.

The defendant offered the testimony of Feinberg, who testified that the wool sold by him to the defendant was all secured from undistinguishable masses of property sold to him by the Underwriters Salvage Company, composed of rags, rope, wool and other property; that after the Underwriters Salvage Company had cleaned up substantially all the debris, he purchased the remainder; that he had his men collect from beneath the pier

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and beneath the water all property which had fallen through the pier; that at no time did he take away property which he had not purchased, and that representatives of the salvage company were present whenever he took away any property.

At the conclusion of the evidence the defendant asked the judge to order a verdict for the defendant. This the judge refused to do, and the defendant excepted.

The defendant also asked the judge to rule and instruct the jury as follows:

1. There is no evidence upon which the plaintiff is entitled to recover.

2. That before a recovery may be had in this action it must appear affirmatively, by a fair preponderance of the evidence, that a return, or offer of return, of the property conveyed by the defendant to the plaintiff must have been made to the defendant before this action may be maintained, unless the property was taken from the plaintiff by the true owner under operation of law.

3. That, in order to maintain this action, it must appear affirmatively that the plaintiff's possession of the articles named in the plaintiff's declaration must have been taken from him by some person, firm or corporation claiming and having a legal and paramount title to all of the goods in dispute, and that the voluntary delivery of such goods without dispossession is not such a delivery as entitles the plaintiff to maintain this action.

4. That the delivery of the goods in question by the plaintiff to any person claiming title without surrender or offer of return to the defendant, and without giving the defendant an opportunity to retake the goods, bars the plaintiff from recovery in this action.

The judge refused to give the first ruling requested, and upon the subject matter of the remaining requests instructed the jury as follows:

"When a man sells personal property to another, he impliedly warrants that he has title, that is, that he has a right to sell it, that it is his property and he has a right to sell it, and there is an implied warranty that he has such right. There is no implied warranty that nobody will make a claim against it, because whatever property you have, there may be somebody

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who will make a claim against it, and there is no warranty on the part of the seller of goods that somebody won't claim it, and if the party who buys it yields to somebody's unauthorized claim, it does not give him a right to damages against the party who sold it. It is only when he yields to a legal claim that he has any rights to damage against the party from whom he purchased it, to recover back either the purchase price or the value of the goods; and so, a party yielding up property to another who demands it without process of law, that is, without a judicial determination, that is, when nothing comes from any court, does so at his peril, and can only recover in case he shows in court that at the time of the sale there was an implied warranty of title on the part of the seller, and that the seller did not have any right to sell it.

"And so, the burden is upon the plaintiff here in regard to both lots of wool, to show that Rotman, at the time he sold to Hartley, did not have any title to the things which he sold; and from that fact, if you find it to be a fact, that Rotman did not have any title at the time he sold to Hartley, then Hartley suffered damages for which he can recover one or both of these amounts. I say one or both of these amounts, because the title to the two different parcels stands upon different grounds."

The jury returned a verdict for the plaintiff in the sum of $833.69; and the defendant alleged exceptions.

J. H. Blanchard, for the defendant.

P. N. Jones, for the plaintiff.

BRALEY, J. It is conceded that at the time the wool was sold and delivered nothing was said as to the defendant's ownership. But by having possession, coupled with the act of sale, he represented himself to be the owner with the legal right of disposal, and this conduct was equivalent to an implied warranty of title in him. *Stedman* v. *Lane*, 19 Pick. 547, 551. *Dorr* v. *Fisher*, 1 Cush. 271, 273. *Whitney* v. *Heywood*, 6 Cush. 82, 86. *Bennett* v. *Bartlett*, 6 Cush. 225. *Brown* v. *Pierce*, 97 Mass. 46. *Shattuck* v. *Green*, 104 Mass. 42, 45. *Stratton* v. *Hill*, 134 Mass. 27, 29. *Boston & Albany Railroad* v. *Richardson*, 135 Mass. 473, 474, 475. See Sales Act, St. 1908, c. 237, § 13. The defendant now makes no contention that the plaintiff, having been called upon to surrender the wool to those who claimed

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to be the true owners, should not have yielded possession without suit, or affording to him an opportunity to retake it, because the breach of warranty, if any, occurred at the time of the sale, when the cause of action also accrued. *Grose* v. *Hennessey*, 13 Allen, 389. *Perkins* v. *Whelan*, 116 Mass. 542. The second and fourth requests were refused rightly.

If the exception to the admission of evidence is treated as waived because not argued, the only question left for decision is whether there was testimony from which the jury could find that the plaintiff, upon whom rested the burden of proof, had returned the wool to the lawful owner. The validity of the defendant's title rested, according to his own admission, upon an abandonment of a portion of the wool, which then had been secured by the boat men from whom he made the first purchase, and a sale to his vendor by the Underwriters Salvage Company from whom he made the second purchase. There was, however, abundant proof that this board, shortly after the fire had been substantially extinguished, took and retained possession through their manager of all the property at the pier, including the wool. It also appeared that the manager alone was authorized to see to the salving and sale of the property, and, he having been called as a witness, if believed, his testimony very plainly showed that there had been no abandonment, and that, while sales of wool had been made, none of the parcels sold included the plaintiff's purchases. In this state of the evidence the first ruling requested could not properly be granted, and the third so far as it correctly stated the law was embodied in the instructions given to the jury, to whose decision the dispute was properly submitted.

We find no error of law at the trial, and the order must be

Exceptions overruled.

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ERVIN W. SWEETSER *vs.* WILLIAM MANNING.

Middlesex. November 10, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Assessment. *Statute.*

Money loaned on a mortgage upon real estate dedicated to use as a cemetery is not a loan upon a "mortgage of real estate, taxable as real estate" under R. L. c. 12, § 16, since the cemetery is exempt from taxation; but such a loan is taxable as personal property under R. L. c. 12, § 4, cl. 2.

CONTRACT by the tax collector of Chelmsford to recover the amount of a tax assessed on the personal property of the defendant in 1904. Writ in the Superior Court for the county of Middlesex dated November 22, 1906.

The case was tried before *Crosby*, J., without a jury. He found for the plaintiff; and the defendant alleged exceptions. The facts are stated in the opinion.

The case was submitted on briefs.

J. W. McEvoy, for the defendant.

F. A. Fisher, for the plaintiff.

KNOWLTON, C. J. The plaintiff brings this action as collector of taxes of the town of Chelmsford, to recover a tax assessed upon the personal property of the defendant on May 1, 1904. His right to recover is questioned only on the ground that a part of the tax was assessed upon the defendant's money at interest, secured by mortgages on St. Peter's Cemetery in the city of Lowell, which cemetery is exempt from taxation under the R. L. c. 12, § 5, cl. 8.

Seemingly the case might be decided in favor of the plaintiff on the ground that, if the tax was wrongly assessed, the defendant's only remedy was by an application for an abatement. R. L. c. 12, §§ 73, 74. *Hicks* v. *Westport*, 130 Mass. 478. But as both parties have argued the question whether the property is liable to taxation, we prefer to put our decision on broader grounds.

The R. L. c. 12, § 2, provide that "All property real and personal situated within the Commonwealth, . . . unless ex-

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empted by law, shall be subject to taxation." Personal property subject to taxation includes "money at interest, and other debts due the person to be taxed more than he is indebted or pays interest for; but not including in any such debts due him or indebtedness from him any loan on mortgage of real estate, taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate." R. L. c. 12, § 4, cl. 2. The property in question is money at interest represented by promissory notes secured by mortgages. But it is not a "loan on mortgage of real estate, taxable as real estate," because the mortgages which secure it are upon a cemetery, and cemeteries are exempt from taxation. Loans on mortgages are taxable as real estate only under the R. L. c. 12, § 16. That section makes taxable as real estate, the interest of a holder of a duly recorded mortgage on real estate not exempt from taxation under § 5. If the mortgaged real estate is exempt from taxation under § 5, the loan on the mortgage cannot be taxed as real estate, and it is left subject to taxation as personal property like other money at interest. See *Knight* v. *Boston*, 159 Mass. 551.

It follows that there is no ground for the defendant's contention that the tax upon these mortgage loans was wrongly assessed.

Exceptions overruled.

COMMONWEALTH TRUST COMPANY *vs.* JAMES S. COVENEY & trustee.

JAMES S. COVENEY *vs.* COMMONWEALTH TRUST COMPANY.

Middlesex and Suffolk. November 10, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings. *Bills and Notes*. *Equity Jurisdiction*.

In equity as well as at law an oral agreement, purporting to control the meaning and legal effect of a contract in writing which is to be made later between the same parties, cannot be enforced to contradict or vary the contract in writing

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when it is made, the effect of the writing being to merge and control all previous oral agreements inconsistent with it.

An oral agreement by a trust company to discount notes for a certain person and to renew them from time to time, and to require payment only of such sums as the debtor may realize as profits from the sales of his real estate, cannot be enforced as a defense to an action by the trust company on the notes, either under an answer at law or as an equitable defense under R. I. c. 173, § 28; nor can the debtor maintain an action of contract against the trust company for a breach of its oral agreement in bringing an action to collect the notes in accordance with their terms.

KNOWLTON, C. J. The first of these actions was brought by the indorsee against the indorser to recover the amount of several promissory notes. The second is an action brought by this indorser against the holder of these notes, upon an alleged contract made before the making of the notes, in which the defendant, for a valuable consideration, agreed to discount notes for the plaintiff and renew them from time to time, and to require payment only of such sums as the plaintiff should realize as profits from the sales of his real estate. The first two counts of the declaration in this action allege the making of the contract, performance by the plaintiff, and a breach of it by the defendant in endeavoring to enforce collection of the notes according to their terms instead of postponing the collection until profits are realized by the plaintiff from the sales of real estate. The third count is more general, alleging the existence of indebtedness from the plaintiff to the defendant, and a contract, for a valuable consideration, to look for the liquidation of the indebtedness only to the profits realized from sales of the plaintiff's real estate, and a breach of the contract by attempting to collect the indebtedness by an action. As a defense to the first action the defendant sets up in his answer the contract relied on in the second action. The cases come to this court upon a demurrer to this answer in the first action, and a demurrer to the declaration in the second action. The principal questions of law are the same in both cases.

In neither case has any question of pleading been argued, but both parties have discussed the cases on the merits, upon the assumption that the contract set up in defense of the first action and declared on in the second action was an oral contract. The counsel of the party relying upon it expressly concedes in

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his briefs that it was an oral contract. Without considering any nice questions of construction, we shall, therefore, treat the averments of the pleadings in both cases as showing it to be an oral contract.

The contention of the defendant in the first action is that it was an independent, executory contract, referring to the course of dealing and the conduct of the parties in the future, by which the plaintiff agreed that notes made payable and discounted in the usual way should not be collected when due, but should be renewed from time to time and finally paid only as profits should be derived from sales of real estate sufficient for the purpose. As we understand his contention, it is that such an agreement, as between the original parties, can be availed of as a defense to an action upon the notes, either under an answer at law by way of estoppel to avoid circuity of action, or when pleaded as an equitable defense under the R. L. c. 173, § 28.

If we assume in favor of the defendant, without deciding that such a defense would be sustained if the contract were in writing, the law is different when the agreement is oral. An oral agreement of this kind cannot be proved to affect the rights of parties under the notes. The familiar rule that a contemporaneous oral agreement cannot be shown to contradict or vary a written contract applies as well to suits in equity as to actions at law. A previous oral agreement, which purports to change the meaning and legal effect of a written contract subsequently to be made, is governed by the same rule as such an agreement made contemporaneously with the making of the written contract. *Davis* v. *Randall*, 115 Mass. 547. *Spring* v. *Lovett*, 11 Pick. 416. *Hall* v. *First National Bank of Chelsea*, 173 Mass. 16. The effect of the writing is to merge and control all previous oral agreements inconsistent with it. The first of these cases, in the principles involved, is almost identical with *Hall* v. *First National Bank of Chelsea*. The decision in that case settles the rights of the present parties.

The third count in the second declaration purports to apply only to indebtedness existing when the agreement was made, and it states a contract, for a valuable consideration, to look for the liquidation of indebtedness in a particular way, without a suggestion of the renewal of notes or the making of any future

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notes. There is nothing to indicate that the facts relied upon in support of this count are different from those referred to in other parts of the pleadings in the two cases. But, standing alone, this count states a good cause of action.

In the first action the entry will be judgment affirmed. In the second action the judgment will be reversed, and the demurrer sustained as to the first and second counts, and overruled as to the third count.

So ordered.

T. Parker, (*C. B. Southard* with him,) for the Commonwealth Trust Company.

P. P. Coveney, for James S. Coveney.

MARY M. THAYER *vs.* FLORENCE KITCHEN & another.

Middlesex. November 10, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Conversion. Actionable Tort. Practice, Civil, Declaration. *Probate Court. Conspiracy. Will.*

In an action of tort, the declaration covered six and one half pages of the printed record before this court, contained extended allegations of the relations of the plaintiff, an unmarried woman, with one R., a widower, and a statement that R. had agreed to give to the plaintiff certain stocks, bonds and securities amounting to $80,000 and to leave her substantially his entire estate by will, that R. made a will and wrote testamentary directions, both of which were in his possession at the time of his death, and "further left to the plaintiff stocks, bonds and money to a large amount . . . all of which belonged to and was the property of the plaintiff," that the defendants, conspiring together to deprive the plaintiff "of all advantages arising to her from a full and complete performance of her contract with R.," made and executed a plan whereby on R.'s death one of them entered the room where he lay and took away the will he had made, the testamentary directions he had written, and all his stocks, bonds and money which were there. There was not in the declaration any description of specific property, nor any other allegation of ownership by the plaintiff than is above set out. The defendant demurred. *Held*, that the declaration did not contain allegations sufficient to maintain an action of tort for conversion.

An action of tort cannot be maintained by one mentioned as a legatee in a will against persons who by conspiring together procured and retained possession of the will and prevented its being offered for probate, since the Probate Court has power to give the aggrieved party ample redress, and therefore has exclusive jurisdiction of the matter.

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CONTRACT OR TORT, setting forth no contract and treated by the court as an action of tort only. Writ in the Superior Court for the county of Middlesex dated July 16, 1906.

The declaration as amended was in one count, occupied six and one half pages of the printed record and contained in substance the following allegations:

The defendant Florence Kitchen had been appointed administratrix of the estate of one Auguste Rolland, who died on May 15, 1905, leaving no wife and as his only heir the said Kitchen. The defendant Stephen R. Jones was an attorney at law in Boston, a business adviser and a social and intimate friend of the defendant Kitchen. Auguste Rolland was a man of large means and for ten years previous to his death had lived at the Hotel Thorndike in Boston. In July, 1895, he had sought and secured the companionship and assistance of the plaintiff, and in consideration of the services rendered and to be rendered and the sacrifices made and to be made for him by the plaintiff, Rolland "promised and agreed to leave to the plaintiff a sum of money sufficient for her support during life, in money, bonds, securities and stock in a sum not less than $30,000, and to leave to the plaintiff, by will, substantially his entire estate of which he should be seised or the owner of at the time of his decease and to leave to the plaintiff the property aforesaid, for her support and independent maintenance during her life, the same to be paid to her at the time of his death in the event that they were not sooner married, and that she should marry him at any time when the said Rolland so desired." The plaintiff performed the services and made the sacrifices required and during the remainder of Rolland's life was his close and almost sole companion, but no marriage took place.

In May, 1905, Rolland made a will and also wrote some testamentary directions, both of which instruments were in his possession at the time of his death, in which he did as he had promised the plaintiff to do in making provision for her, "and the said Rolland further left to this plaintiff stocks, bonds and money to a large amount for her own separate use, benefit and support, all of which belonged to and was the property of the plaintiff."

Learning of the last sickness of Rolland, the defendants

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"conferred together and then and there combining, confederating and conspiring for their own lucre, benefit and gain to injure and defraud the plaintiff, and so to arrange matters that the plaintiff should be deprived, refused and cut off from all advantages arising to her from a full and complete performance of her contract with the said Rolland and to deprive her of any interest or right or gratuity or remuneration for her services rendered or otherwise and from all benefits resulting from the last wishes of the said Rolland," planned that the defendant Jones should take apartments near those of Rolland at the hotel and that, immediately on Rolland's death, Jones "was to enter the room where the deceased lay, seize, take and carry away all of the papers, documents, money, bonds, letters, notes and all written instruments and then and thereafter hold, secrete and conceal the same and thereafter to claim and maintain in pursuance of their said acts, conduct and purpose that there were no written instruments or documents as aforesaid, no stock, bonds, or money in said room, no bank account and only a very small estate, if any, and that this plaintiff had no rights as creditor or otherwise, although the said Jones and the said defendant Kitchen knew and had well known for many years up to the time of the said Rolland's decease the duties, relations and friendship and attachment between the said Rolland and the plaintiff." The plan was carried out.

The defendants demurred on grounds both general and specific. The demurrers were sustained by *Fox*, J., judgment was entered for the defendants, and the plaintiff appealed.

H. N. Allin, for the plaintiff.

F. W. Eaton, for the defendants.

RUGG, J. This is an action of tort. The defendants' demurrer to the declaration was sustained. Judgment was thereupon entered for the defendants, from which the plaintiff appealed. The allegations of the declaration are voluminous. There are some floating statements, which, it is argued, amount to an averment that one Rolland gave to the plaintiff certain stocks, bonds and other securities, which the defendants have taken and secreted. But the pleading falls far short of any sufficient allegation of conversion, and indeed does not appear to be directed to any such end. That form of declaration is familiar, and its

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material averments are brief and lucid. If that was the kind of action intended, the declaration was plainly open to objection as composed of ambiguous, multifarious and irrelevant matter, and not being a concise and substantially certain statement of the substantive and necessary facts. If, however, from the mass of language employed there is excerpted all that looks toward trover, it is plainly insufficient. There is no description of specific property, but merely a general reference to certain classes of personal property, which is utterly devoid of definiteness. It is also extremely doubtful if there is any averment of ownership, save as an alleged inference from other circumstances, which in themselves are inadequate to show any title vesting in the plaintiff at any time.

The declaration is obviously framed with another purpose. It is not necessary to recite its substance further than to say that it avers that one Rolland executed and left unrevoked at his death a will, in which the plaintiff was named as beneficiary to a large sum, and that the defendants immediately after the decease of said Rolland took possession of this will, and have concealed or destroyed it, and denied its existence, so that the plaintiff has failed of her legacy. The only question is whether this constitutes a cause of action at law.

Under the law and practice in this Commonwealth, the Probate Court has exclusive original jurisdiction of all matters pertaining to proof of wills. Speaking generally, the Probate Court is established for the purpose of passing upon all probate matters. Hence such proceedings pertaining to wills, in the first instance, belong there, and its decrees touching those subjects are binding upon all other tribunals. The subject has been discussed in *Waters* v. *Stickney*, 12 Allen 1, *Gale* v. *Nickerson*, 144 Mass. 415, and *Crocker* v. *Crocker*, 198 Mass. 401, and it is not necessary now to traverse the ground anew. The Probate Court has full authority in proper cases to allow the proof of a lost will by any competent evidence of its contents. *Tarbell* v. *Forbes*, 177 Mass. 238. Express provision is made in detail by R. L. c. 135, §§ 14, 15, requiring any person having the custody of the will of a deceased person to seasonably deliver it to the Probate Court having jurisdiction, with a heavy penalty upon one, who fails in this duty unreasonably, after being duly cited into court

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for this purpose, and conferring full power as to examination under oath of any suspected person. This court has never had occasion to consider what relief apart from statute might be open to persons injured by concealment or destruction of wills. The subject has been regulated by statute at least since Prov. St. 1692–3, c. 14, § 2; 1 Prov. Laws (State ed.) 45. *Hill* v. *Davis*, 4 Mass. 137. Decisions in other jurisdictions, where a different practice prevails, and where relief in chancery or otherwise has sometimes been afforded, need not be reviewed. It is possible that apart from the statute the Probate Court would be the only tribunal clothed with power in the premises. *Stebbins* v. *Lathrop*, 4 Pick. 33. But, however this may be, the subject is one of difficulty, and precisely what relief might be given and in what court is not clear, and has never been settled in this Commonwealth. Under these circumstances the statute has provided a clear, ample and expeditious remedy. By numerous decisions of this court, when the Legislature provides such a remedy, it has been held to be exclusive. Other relief will be refused where plain and adequate statutory redress is available. *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 194, and cases there cited.

Judgment affirmed.

ELECTRIC WELDING COMPANY, Limited, *vs.* FREDERICK H. PRINCE & others.

Suffolk. November 11, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Evidence, Proof of foreign law. *Corporation*, Foreign, Liability of stockholders. *Practice, Civil*, Reservation by report.

In certain actions to enforce the liability of registered stockholders under the companies act of Great Britain, St. 25 & 26 Vict. c. 89, the liability of the defendants depended on what the law of England was, and there were put in evidence an auditor's report and answers to interrogatories, oral testimony of some of the defendants and particularly the oral testimony of an eminent English barrister who testified at length, discussing and expounding most if not all of the numerous English decisions bearing upon the questions at issue. All of these decisions were put in evidence as well as the act of Parliament in question, St. 25 &

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26 Vict. c. 89. The evidence was such that a tribunal of fact could find upon the whole evidence, following the opinion of the expert, that there was no ground for charging the defendants under the law of England, and, on the other hand, the English decisions put in evidence would warrant a tribunal of fact in returning verdicts for the plaintiff, so that the counsel on both sides could make strong arguments in favor of their respective contentions. The facts to which the law of England was to be applied differed materially from those in any case decided by an English court. *Held*, that, in this state of the evidence, the question of fact as to what the law of England was must be left to the jury, and that it was error to order a verdict either for or against any of the defendants.

At a trial, in which the question what the law of England is on a certain subject is an issue, an opinion of this court at an earlier stage of the same case, dealing with the law of England as proved at a former trial of the case, is not admissible in evidence to show what the law of England is.

By a report made in an action at law by a judge of the Superior Court or of the Supreme Judicial Court under R. L. c. 173, § 105, only questions of law can be presented for determination by the full court, and this court, even by the agreement of the parties in a case where the fact to be determined upon the evidence is what the law of a foreign country is, have no authority to decide what verdict should have been rendered by the jury.

SEVENTEEN ACTIONS OF CONTRACT, by a corporation organized on May 1, 1899, under the companies act of Great Britain, St. 25 & 26 Vict. c. 89, to recover certain sums of money alleged to be due from the several defendants on their respective subscriptions for ordinary shares of the plaintiff's capital stock. Writs dated May 12, 1894.

In the Superior Court these cases together with three others were sent to an auditor and later were tried before *Hardy*, J., who directed verdicts for the defendants, and reported the cases to this court for determination. In a decision, reported in 195 Mass. 242, it was ordered that the cases should stand for trial upon the second count of the declaration, which sought to hold the defendants as registered stockholders under the companies act of Great Britain.

Seventeen of the cases accordingly were tried again before *Gaskill*, J., upon the second count and upon a fourth count added by amendment as explained in the opinion.

At the close of the evidence, the judge, after conference with the parties, ordered a verdict for the plaintiff against the defendant Prince on the fourth count, a verdict for the plaintiff against the defendant Pope on the fourth count, verdicts for all the defendants on the second count and a *pro forma* verdict for each of the defendants except Pope and Prince on the fourth

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count. The defendants Pope and Prince excepted to the ordering of the verdicts against them, and the plaintiff excepted to the ordering of the verdicts in favor of the defendants on the second count and to the ordering of the verdicts in favor of the defendants except Pope and Prince on the fourth count. The verdicts were returned by the jury in accordance with these directions, and the judge reported the cases for determination by this court it being agreed by the parties that, if upon the competent evidence set forth in the report the ordering of the verdicts was correct, judgment was to be entered in accordance with such directions and verdicts. If, in any case, a different verdict should have been ordered or returned, this court might so order, and final judgment might be entered accordingly. If any of the verdicts should be set aside, then such order was to be made. The parties agreed that the determination of the English law, in law and in fact, was to be made by this court upon the competent evidence reported.

E. F. McClennen, for the plaintiff.

C. A. Hight, (*G. S. Selfridge* with him,) for the defendants.

KNOWLTON, C. J. These seventeen cases, brought to enforce the same kind of a liability against different defendants, were tried together in the Superior Court and were reported by agreement of the parties for our determination. They have been before us previously, and the report of them may be found in 195 Mass. 242. At the first trial verdicts for the defendants were ordered, and the cases were reported to this court on questions of law.

There were three counts in the declaration in each case. The verdict was treated as a separate verdict on each count, and the result of the hearing in this court was to leave the verdict to stand upon the first and third counts, and to set it aside on the second count in all the cases. The order in each rescript was "Case to stand for trial on the second count." This left the cases pending on the second count only. After the close of the evidence at the last trial an amendment to the declaration was allowed, which introduced a fourth count that rests upon the same general grounds as the second count, but seemingly was designed to meet the defendants' contention that there was a variance between the averments and the proof. The

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principal facts appear in the report of the former decision of this court.

Besides the evidence taken at the first trial, which consisted of an auditor's report, answers to interrogatories, and decisions, there was additional evidence at the last trial, consisting of a deposition, testimony of some of the defendants, and particularly the oral testimony of a very eminent English barrister, Mr. Hamilton, who has written a text book of authority known as "Hamilton's Company Law" and has often argued important cases of company law before the highest courts of England. He was called by the defendants and testified at great length, discussing and expounding most if not all of the numerous English decisions bearing upon the questions of law at issue in these cases. All of these decisions were put in evidence, many of them by the plaintiff, so that the court had before it a large body of English law contained in many decisions of the courts, together with the opinion of this expert in regard to these decisions and the act of Parliament in question. The statute is "The companies' act," 25 & 26 Vict. c. 89, and the language on which the plaintiff sought particularly to hold the defendants is the last clause of § 323, as follows: "and every other person who has agreed to become a member of the company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The plaintiff's contention is that the defendants, by virtue of their several agreements with a promoter to underwrite certain amounts of the stock of the plaintiff corporation at its organization, and of the entry of their names as stockholders upon the registry of the corporation about sixteen months later, without their knowledge, followed by notice of the registration and their omission to take any action in regard to it, became bound to pay to the corporation the par value of the stock allotted to them. At the close of the evidence the presiding judge ordered verdicts for the plaintiff against the defendants Prince and Pope, each of whom had made a payment after the registration, and ordered verdicts for all the other defendants, and reported the cases.

The first questions that arise under the report are whether these orders were right as a matter of law. The principal contention between the parties was in regard to the law of Eng-

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land by which their rights are governed. The law of a foreign country is not judicially recognized by our courts, but is a fact to be proved like any other fact in a case. *Ufford* v. *Spaulding*, 156 Mass. 65. *Hazelton* v. *Valentine*, 113 Mass. 472, 478. Said Mr. Justice Endicott in *Ames* v. *McCamber*, 124 Mass. 85, 91: "When the law of another State is in dispute, it is to be determined as a question of fact by the court or jury trying the cause. . . . If the evidence was conflicting, as the plaintiff contends, we have no authority to revise the finding, although the judge has reported the evidence." The proof of the law of a foreign country may be by the introduction in evidence of its statutes and judicial decisions, or by the testimony of experts learned in the law, or by both. If the law is found in a single statute or in a single decision, the construction of it, like that of any other writing, is a question of law for the court. As was said in *Wylie* v. *Cotter*, 170 Mass. 356, 357: "The law of another State is a fact to be proved, like any other fact, by evidence. Where the evidence is a single statute or a decision of a court, the language of which is not in dispute, the interpretation of it presents a question of law for the court; but where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences may be drawn from them, the question to be determined is one of fact, and not of law." Questions of the latter kind must be decided by the jury and not by the judge.

In the present case, if the jury followed the opinion of the expert, they would decide that there was no liability on the part of those defendants who made no payments after the registration. We are of opinion that there was evidence in his testimony, taken in connection with inferences that might have been drawn from other evidence, which would have warranted them in reaching the same result as to the defendants Prince and Pope, against whom verdicts were ordered. The counsel on both sides have been able to make strong arguments in favor of their respective contentions. A tribunal of fact well might find upon the whole evidence that there was no ground for charging the defendants under the law of England. On the other hand, all the decisions were in evidence on which this

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court, in the former opinion, held that there was evidence which should have been submitted to the jury on which the defendants might have been found liable. These decisions would warrant a tribunal of fact in returning verdicts for the plaintiff. In its facts this case differs materially from any decided by the English courts, and such a tribunal might think that the expert witness was wrong in his application of the principles of law to the evidence. Then too, in connection with the determination of what the law of England is, comes the question what inferences shall be drawn from the findings of the auditor and the other evidence, considered in connection with the English statute as interpreted by the English courts. We are of opinion that all or nearly all the important questions in dispute were questions of fact, upon which the judge could not properly rule as matter of law, and that all the verdicts must be set aside.

The plaintiff's offer of the former opinion of this court as evidence was rightly rejected. The opinion was not evidence of the law of England. *Gordon* v. *Knott*, 199 Mass. 173, 179. Our decision as to that part of the cases which was left open was only that the cases should have been submitted to the jury on the second count. In dealing with the law of England as a fact, the court held that the decisions put in evidence at the trial would warrant the jury in finding for the plaintiff.

In making his report the judge, with the consent of the parties, has undertaken to present to this court the question what verdicts the jury should have rendered, if the cases had been submitted to them. The power of a judge to report a case after a verdict on the law side of the court is found in R. L. c. 173, § 105, which is in part as follows: "A justice of the Supreme Judicial Court or the Superior Court, after verdict, or after a finding of facts by the court, . . . may report the case for determination by the full court." Under this language the facts must first be found either by a jury or by the judge, and the case may then be reported. This means the case upon the facts found, or, in other words, the questions of law. The full court as an appellate tribunal, on its law side, has jurisdiction only of questions of law. In the R. L. c. 156, § 7, the power of justices of the Supreme Judicial Court to reserve questions for

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the full court includes only questions of law. Under § 6 of the same chapter, the jurisdiction that is given in the classes of cases therein mentioned is only of questions of law. Questions of discretion or questions of fact of any other kind cannot be carried to the full court, either by report or by exception or appeal. Said Chief Justice Gray in *Churchill* v. *Palmer*, 115 Mass. 310, 313, "The authority given by statute to the Superior Court to make reports to this court extends only to questions of law. A report, like a bill of exceptions, should be so framed by the presiding judge, or by the counsel with his approval, as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions to this court. The decision of the jury or the court below upon questions of fact or the weight of evidence is not open to revision here." See also *Sheffield* v. *Otis*, 107 Mass. 282. In equity the rule is different. Questions of discretion and other questions of fact are open upon an appeal or a reservation.

Under this part of the report we have no authority to take upon ourselves the duties of a tribunal of fact, and to determine what verdicts should have been rendered by the jury. No judgment could legally be founded upon such action by this court. Not even an agreement of the parties can give us jurisdiction so to act in a judicial capacity. Action of this kind at the request of the parties would be merely that of a number of arbitrators proceeding without statutory authority. Convenient and helpful as it might be to the litigants to have these cases finally decided without further litigation, we must decline to act extrajudicially in a matter that comes before us sitting as a court. In each of the cases the entry must be

Verdicts set aside and new trial granted.

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JOHN S. DAVIDSON *vs.* JOSEPH I. STEWART & trustee.

Suffolk. November 11, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Mechanic's Lien. Payment.

Where, while labor is being performed and materials furnished under an entire contract in writing with one who owns certain land for the painting of the buildings thereon, such land being subject to a mortgage, and during the progress of the work the land is divided into four lots, three of which are released from the mortgage and conveyed to a third party and the mortgage is foreclosed upon the fourth, the contractor upon the completion of his contract may maintain under R. L. c. 197 a petition to enforce a lien for such labor and materials upon the three portions of the original lot upon which the mortgage was not foreclosed.

An entire contract for the furnishing of labor and materials for the painting of the buildings upon certain land was contained in a proposition in writing by the contractor to do the labor for $775, the owner furnishing the material, "or pay me for the material, Sixty, Ninety and One Hundred Twenty days notes. . . . The total amount of contract for stock and labor will be $1,125 as above." The landowner accepted the proposition as follows: "I accept your estimate, terms and figures, on condition you accept a time note for the three Hundred referred to." The contractor performed the labor and furnished the materials in accordance with the contract. The landowner paid him cash to a certain amount and gave him two notes of $100 each which were duly paid and a third note for $100 which was not paid and, after failure of the landowner to meet it, was returned to him by the contractor. *Held*, that the provision of the contract in relation to payment in part by notes did not deprive the contractor of his right to a lien on the real estate to secure the payment of the balance due to him under the contract.

Evidence that, for the purpose of paying a debt, a debtor gave to his creditor three notes for $100 each, payable at future dates, which the creditor entered upon his books, "3 notes $100 — $300," that two of the notes were paid but that the third remained unpaid and was taken up by the creditor who thereupon changed the entry on his book to read, "2 notes $100— $200," and surrendered the unpaid note to the debtor, will warrant a finding that the third note was not accepted as absolute payment and that the debtor need not be credited therewith.

PETITION to establish a mechanic's lien for labor performed and materials furnished under an entire contract in writing between the petitioner and the respondent Joseph I. Stewart. The petition was filed in the Superior Court for the county of Suffolk on May 17, 1907.

The contract was contained in a proposition in writing by the petitioner to Stewart and an acceptance in writing by Stewart.

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In the proposition the petitioner offered "to do the labor in painting, varnishing, etc., on your new brick apartments, property of fourteen apartments and one store, corner of Geneva Avenue and Charles Street," for $775, "you furnishing the material, or pay me for the material, Sixty, Ninety and One Hundred Twenty days notes. . . . The balance for labor to be advanced per week, as the work progresses. The first Three Hundred Dollars paid me, to be credited to other work that I have now done; the balance as the work progresses and at the rate of 60% of the cost of labor weekly, the balance within thirty days after completion. The total amount of contract for stock and labor will be Eleven Hundred Twenty-five Dollars ($1,125.00) as above. If this is satisfactory, please accept and return." The acceptance of Stewart was as follows: "I accept your estimate, terms and figures, on condition you accept a time note for the three Hundred referred to. Joseph I. Stewart."

The case was referred to an auditor, who filed a report in which he found that the petitioner was entitled to a lien for the contract price less cash payments of $266.70, and the proceeds of two notes of $100 each. His findings with regard to the note, referred to in the last paragraph of the opinion, were as follows: "A question was raised at the hearing as to whether a further credit of $100 should have been given on account of another note. It appeared that Stewart during the progress of the work gave the petitioner three notes of $100 each, which notes the petitioner entered on his books as '3 notes $100 — $300.' Two were paid as above stated. The third remained unpaid, was taken up by the petitioner who then changed the entry on his books to '2 notes $100 — $200,' and surrendered the unpaid note to Stewart early in 1907. I rule that the third note was not accepted in absolute payment and need not be credited. If but two notes are to be credited the balance due the petitioner under his contract is $656.30; if on the other hand all three notes should be credited, the balance due will be $556.30."

The case was heard by *Aiken*, C. J., without a jury. It appeared that the four lots into which the land was divided, as stated in the opinion, were numbered 16, 17, 18, 19, that the mortgage therein referred to was foreclosed upon lot 16 and released as to the other three, which were conveyed to the respond-

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ent Blanchard, trustee, while the petitioner still was performing his contract.

At the close of the evidence the respondent Blanchard requested the following rulings:

1. Upon all the evidence in the case as a matter of law the petitioner cannot maintain his lien.

3. The petitioner cannot maintain his lien upon a part of the original tract included in his contract after a portion thereof has been freed from the lien by the foreclosure of the prior mortgage.

4. Under the petitioner's written contract he was to be paid for materials furnished by promissory notes of Joseph I. Stewart, and he cannot claim a lien for materials.

The rulings were refused, the lien was established for the amount found by the auditor, and the respondent Blanchard alleged exceptions.

Other facts are stated in the opinion.

W. R. Bigelow, for the trustee.

J. E. Crowley, for the petitioner.

KNOWLTON, C. J. This is a petition to enforce a mechanic's lien for labor and materials upon a lot of land and five houses thereon, in the erection of which houses the labor and materials were furnished. When the contract was made there was a duly recorded mortgage on the land. Afterwards, while the work was going on, the lot was divided into four smaller lots. At a later date three of the lots were released from the mortgage, and still later the mortgage on the other lot was foreclosed by a sale, the proceeds of which were no more than enough to satisfy the mortgage. The respondents contend that the lien cannot be enforced against the three remaining lots, because of the releases and the foreclosure.

By virtue of the contract and the work done under it a lien was acquired upon the whole lot, which was divided subsequently. But this land was subject to the rights of the mortgagee. The petition is to enforce the lien upon the whole large lot, which includes the four smaller lots. Except as against the title held under the mortgage, the lien is established. The release of three of the lots from the mortgage leaves the lien with full effect upon them, while the foreclosure of the mortgage on

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the other lot leaves nothing remaining in that upon which the lien can continue in force. The judge rightly refused the rulings requested and established the lien. It can be enforced and given effect only upon so much of the original lot as has not been taken out from under the lien by the foreclosure of the mortgage.

The provisions of the contract in relation to payment in part by notes did not deprive the petitioner of his right to a lien. Payment has not been made, except of the amount credited. The judge decided rightly that the note afterwards returned was not accepted as an absolute payment.

Exceptions overruled.

KILMAN SILVERMAN *vs.* FRED M. CARR & others, executors.

Middlesex. November 12, 1908.—January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence. Landlord and Tenant.

At the trial of an action of tort for personal injuries alleged to have been received by the plaintiff by reason of negligence of the defendant or his employees, it appeared that the defendant leased to the plaintiff certain premises for use as a factory and made a contract to furnish to him, for a fixed price during the working hours of the factory, power for the running of it from a building across the street, it being agreed that, if the power was used beyond such working hours, an extra charge should be made. The power so furnished was carried across the street by means of a rope drive, and thence communicated by the plaintiff without the use of tight and loose pulleys to a counter shaft and thence to a main shaft in the factory. There was evidence tending to show that the failure of the plaintiff to use tight and loose pulleys was not improper, that the mechanical arrangements for starting and stopping the rope drive were in the building across the street from the plaintiff's factory and entirely under the control of the defendant, that the working hours of the plaintiff's factory were over at 6 P. M., that on the afternoon of the plaintiff's injury the power had been turned off and the rope drive had ceased running, and that thereupon the plaintiff had begun to relace a belt which was out of repair on the counter shaft in a manner which the evidence tended to show was proper, when at 6.25 P. M. without warning the rope drive started up and the plaintiff was injured. There was no evidence to explain the starting of the rope drive. The presiding judge ordered a verdict for the defendant and reported the case. *Held*, that a verdict should not have been ordered for the defendant, since the jury might have found that the plaintiff was in the exercise of due care, that it was the duty of the defendant to exercise reasonable diligence not to start the rope drive without warning the plaintiff after it had been stopped at the close of the

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working hours, and, in the absence of any explanation from the defendant in whose exclusive control the starting and stopping apparatus was, that the starting of the rope drive was due to a failure on the part of the defendant to exercise such diligence.

TORT, for personal injuries received by the plaintiff by reason of alleged negligence of the defendants' testator, as stated in the opinion. Writ in the Superior Court for the county of Middlesex dated February 5, 1904.

At the trial, which was before *Bishop*, J., the material facts in evidence were as stated in the opinion. The presiding judge directed a verdict for the defendants and reported the case for determination by this court.

L. S. Thierry, for the plaintiff.

J. W. Keith, (*E. D. Sibley* with him,) for the defendants.

BRALEY, J. It was not in dispute that the plaintiff, having leased the premises to be used in the manufacture of tables and chairs, also hired from the defendants' testator, whose factory was on the opposite side of the street, power to operate the machinery which he used in his business. The power supplied was communicated by a rope drive running from the factory across the street to the plaintiff's shop, where by means of a jack shaft it was transmitted to the main shaft, and thence to the various machines. It also could have been found that the entire mechanical arrangement for starting and stopping the rope drive were in the factory and wholly under the direction and control of the defendants' testator. By the terms of the contract it was agreed for a fixed price, that the plaintiff should have the right to use the power during the working hours of the factory, but, if he desired to run his machinery longer, the overtime would be an additional charge. A further finding would have been justified, that as lessor the defendants' testator must have understood and been fully informed of the purpose for which the premises had been let and the use of the power hired. Consequently he was reasonably bound from common experience to know and anticipate, that if without warning, after having been properly stopped, the rope drive was shortly after set running, the plaintiff's machinery unexpectedly would be put in motion, and either he or his workmen might be injured. *Schofield* v. *Wood*, 170 Mass. 415. *Turner* v. *Page*, 186 Mass. 600,

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602, and cases cited. *Oulighan* v. *Butler*, 189 Mass. 287, 292, and cases cited. *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341, 344.

If they found these facts, then the testator for a consideration had undertaken, not only to maintain the rope drive with its connections in the factory in proper repair, to furnish power during the time required, but to exercise reasonable diligence to see that, unless notice had been given previously, the power should not be turned on until the next morning, after having been shut off at the close of the day. *Gill* v. *Middleton*, 105 Mass. 477, 478. *Poor* v. *Sears*, 154 Mass. 539.

It is stated in the report that on the day of the accident "the power in the plaintiff's shop stopped as usual about six o'clock" when "at about twenty-five minutes past six o'clock . . . the machinery suddenly and without notice started in rapid motion," causing the injuries for which damages are sought. The defendants contend that these circumstances are insufficient to prove negligence of their testator. But again, no intervening cause having been shown or suggested, or any explanation offered, the jury were at liberty to infer, from his exclusive control of the appliances, that according to common experience, until otherwise explained, the machinery would not have started, nor the accident occurred, except for some defect in the belting or appliances used in starting the rope drive or in the proper use of them, arising from the negligence of either himself or his servants. *Ryan* v. *Fall River Iron Works Co.*, *ante*, 188, 191, 193, and cases cited. It has been said, that "the happening of an accident if it is one that the exercise of ordinary care would ordinarily prevent, is some evidence of negligence." *Mahoney* v. *New York & New England Railroad*, 160 Mass. 573, 579.

The issue of the plaintiff's due care also was for the jury. The power was furnished and used as a whole, and, when it was withdrawn, no part of the machinery would be left in operation. His carefulness or want of it is to be measured by the conditions existing at the time. A belt connecting the countershaft of the moulding machine with the main belt had become partially unlaced, and, after the power had been discontinued and the machinery at rest, the plaintiff, discovering this condition, began

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to put in a new lacing. It could have been found from his experience in the management of the shop, that the rope drive regularly ceased running each working day at six o' clock in the evening and did not start again until the next morning. The only time in which repairs of this nature could be made was when the machinery was idle, and, as he had no reason to apprehend that the usual practice would be disregarded, his conduct, which rested on this assumption, cannot be said as matter of law to have been negligent, even if, having regard for every possible contingency, he might while at work have slipped the belt from the pulley to the shaft itself. It was plain enough from his evidence, as well as from the testimony of the expert engineer, that, if the belt hung loosely on the shaft, to relace it properly would be practically impossible, and that he was doing the work in the ordinary way. *Droney* v. *Doherty*, 186 Mass. 205. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437, 441, and cases cited. Nor is the further contention of the defendant, that the plaintiff's failure to equip the shaft with tight and loose pulleys must be deemed conclusive evidence of his contributory negligence, tenable. The expert testified, that the absence of tight and loose pulleys by which main belts could be shipped was customary, and practically their use for this purpose had become obsolete. If believed, this evidence would warrant a finding that the mechanical equipment was neither defective nor deficient.

By the terms of the report the verdict ordered for the defendant must be set aside, and the case is to stand for trial.

So ordered.

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FREDERIC R. CUTTER & another *vs.* CITY OF BOSTON.

Suffolk. November 12, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Damages, For property taken or injured under statutory authority. *Grade Crossing Acts*. *Way*, Private. *Evidence*, Opinion: expert.

A person whose property is injured by the obstruction or taking of a private way in the abolition of a grade crossing under St. 1890, c. 428, may recover damages under § 5 of that statute, such injury differing from that ordinarily caused by the discontinuance of a public way in being special and peculiar.

On the question of the damaging effects upon a petitioner's property of the obstruction of a private way in the abolition of a grade crossing, a witness may be found by the presiding judge to be qualified to testify as an expert if it appears that, in addition to a long experience as an auditor in this class of cases and as a former judge of the Superior Court, he is the owner of the legal title to and the manager of an estate adjoining the petitioner's property and has been familiar with the neighborhood for many years, although he does not profess to have much knowledge of the market price of real estate there, he not being asked to state the damage in money but only the general effect of the change upon the petitioner's estate and the percentage of value taken away.

PETITION, filed on April 3, 1901, under St. 1890, c. 428, § 5, for the assessment of damages caused by the abolition of a grade crossing as described in the opinion.

In the Superior Court the case was heard by *Gaskill*, J. The facts which appeared in evidence are stated in the opinion.

The petitioners introduced the testimony of various expert witnesses tending to show that the raising of the grade of Cambridge Street, by cutting off access through Crafts Street, had depreciated the market value of their land. Among those who testified as to the damage to the petitioners' land was Hon. Henry Wardwell, formerly a justice of the Superior Court, who was executor under the will of the former owner of the lot on Roland Street next east of the petitioners' land, and as such executor held the title to that lot at the time of the trial. The judge permitted him to testify, subject to an exception by the respondent as to his qualification as an expert.

At the close of the evidence, the respondent asked the judge to make the following rulings:

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1. On all the evidence the verdict must be for respondent.

2. The petitioners are not entitled to recover for damage to their property by the closing of Crafts Street.

3. As other access remained, the damage to the petitioners' property by the closing of Crafts Street was not special and peculiar.

The judge refused to give these rulings, and submitted the case to the jury under instructions which permitted them to consider the damages to the petitioners' lot by the closing of Crafts Street. The respondent excepted. Full instructions were given to the jury which it was agreed were appropriate, except so far as they were inconsistent with the respondent's request for rulings, and no other exceptions were taken.

The jury returned a verdict for the petitioners in the sum of $2,266.87; and the respondent alleged exceptions.

P. Nichols, for the respondent.

C. F. Jenney & S. Robinson, for the petitioners, were not called upon.

KNOWLTON, C. J. This was a petition to recover damages, under the provisions of St. 1890, c. 428, § 5, for injury to the land of the petitioners by the abolition of the grade crossing of the Boston and Maine Railroad at Cambridge Street, in that part of Boston which was formerly Charlestown. The petitioners' premises were situated at the corner of Crafts Street and Roland Street, which were private ways through which the petitioners had rights of passage appurtenant to their land. Crafts Street led directly to Cambridge Street, which was the nearest highway, and Roland Street ran parallel to Cambridge Street, and was connected with it by another private way called Crescent Street, in which the petitioners also had rights of passage. Crafts Street and Crescent Street entered Cambridge Street at grade. By the abolition of the grade crossing Cambridge Street was carried over the tracks of the railroad, and its grade at the intersection of Crafts Street was raised about seven feet. The decree provided "that the northerly end of Crafts Street be closed to all travel." Crafts Street was left at its former grade, terminating at the bottom of a stone wall seven feet high, forming the abutment of Cambridge Street. The petitioners' premises had no access to any public street except

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over some of these private ways, and, after access with teams to Cambridge Street by way of Crafts Street was cut off, the only access of this kind to that street was by a circuitous route which was comparatively inconvenient for the occupants of the property. The respondent contended that there was no liability, either on the part of the city or the railroad, for the damage to the petitioners' estate from cutting off access through Crafts Street to Cambridge Street.

The question thus raised is answered favorably to the petitioners by the decisions in *Munn* v. *Boston*, 183 Mass. 421, and *Webster* v. *Lowell*, 142 Mass. 324. See also *Sheehan* v. *Fall River*, 187 Mass. 356, 361. The petitioners were the owners of an interest in the land in Crafts Street where it abutted upon Cambridge Street. Apart from their right as owners of an easement in the premises abutting on Cambridge Street, they were entitled to damages to their real estate at the corner of Crafts Street and Roland Street, with its appurtenances, by reason of the effect of the change of grade upon the value of that property for use.

The principal contention of the respondents' counsel is that, because damages are not allowed for the discontinuance of a public way to persons who have other access to the public streets, and whose estates do not abut on the part of the way discontinued, no damage should be allowed to persons whose property is damaged by the obstruction or taking of a private way. See *Smith* v. *Boston*, 7 Cush. 254; *Davis* v. *County Commissioners*, 153 Mass. 218; *Hammond* v. *County Commissioners*, 154 Mass. 509; *Hyde* v. *Fall River*, 189 Mass. 439. But the reason why damages are not allowed in this last class of cases is that they are general, and not special and peculiar; in other words, they do not differ in kind from those suffered by the public generally, although they may be much greater in degree. The reasons for the distinction are stated fully in the cases just cited. But in the present case the damages are special and peculiar. The public have no rights in these private ways, and they suffer no damages from the obstruction of Crafts Street at its junction with Cambridge Street. See *Munn* v. *Boston*, *ubi supra*, and *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351.

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The presiding judge properly might find that Judge Wardwell was qualified to testify as an expert as to the damaging effects of the change upon the petitioners' property. In addition to a long experience as auditor in this class of cases, and as a former judge of the Superior Court, he was the owner of the legal title to and the manager of an estate adjoining the petitioners' property and had been familiar with the neighborhood for many years, although he did not profess to have much knowledge of the market price of real estate there. He was not asked to state the damage in money, but only the general effect of the change upon the estate, and the percentage of value taken away. *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313, 319, 329. *Brainard* v. *Boston & New York Central Railroad*, 12 Gray, 407, 409, 411. *Swan* v. *Middlesex*, 101 Mass. 173, 177. *Dwight* v. *County Commissioners*, 11 Cush. 201.

Exceptions overruled.

ANNIE T. LYNCH, administratrix, *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 12, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Railroad.

One employed by a railroad corporation as a sealer of freight cars in a freight house, who in the ordinary course of his employment is standing on a ladder which rests on a narrow space between two railroad tracks, engaged in sealing the door of a car on one of the tracks, where a car cannot pass on the other track without hitting the ladder, and is thrown down and injured by reason of the ladder's being knocked from under him by a switching engine running in on the other track, cannot recover from his employer for his injuries thus caused, the risk of such an accident being an obvious one assumed by him by continuing in his employment after its circumstances were known to him.

BRALEY, J. This is an action of tort at common law to recover damages for the conscious suffering of the plaintiff's intestate from injuries alleged to have been caused by the defendant's negligence, and from which he shortly after died. In the Superior Court at the close of the evidence for the plaintiff, upon

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the request of the defendant, a verdict was ordered in its favor, and the case is here on the plaintiff's exceptions. The evidence, which must be taken as true, showed that at the time of the accident the decedent was employed as a sealer of freight cars in the "freight house." This house was a long covered building with a way or street on one side for the use of teams, and an entrance at the westerly end through which two tracks entered from the adjoining yard at a grade which brought the floor of the cars level with the platform of the house, where the freight was received and delivered. The track nearest the platform was known as "the house or first track," and terminated within the building, while the other referred to as the "back track" was connected with the other tracks in the yard, and ran through to the dock. In handling freight the merchandise was loaded either from the platform directly into the cars on the first track, or when necessary into cars on the back track by means of bridges placed between the car doorways, and as required the cars were moved into position by switching engines, each in charge of a "switching crew of six men," but they ran irregularly, as the time of their entrance was determined by the assistant yard master. After being loaded, the doors of each car had a seal put on, and then the train was taken out, and empty cars run in to take their places. In sealing the doors next to the back track the sealer used a ladder, which rested in the space between the tracks, the width of which does not appear, but is described as being so narrow that "there was just space enough to go by between the two tracks" or, as stated by one witness, "you couldn't put the ladder against the car on the front track without having the foot in such relation to the train on the other track, that if there was any motion of the train on that track, it would be liable to knock down the ladder." There was evidence that the house was somewhat dark, being lighted in the daytime only by the doorways on the street side and the open ends, and that, by reason of the curvature of the tracks, the decedent from the position where he was at work could not see approaching cars until they arrived at the westerly entrance. Before running cars or engines over the back track it had been customary for either the brakeman or the "yard man" to warn him of their approach. In the uncontradicted answer of the

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president of the defendant to the interrogatories propounded by the plaintiff, which she introduced in evidence, it was stated that there was no rule of the railroad requiring a warning to be given, and, "that the practice was, for employees working about the cars or tracks in the car house, to look out for their own safety as being the most appropriate means to avoid danger, considering the variety or character of the work . . ." It also was undisputed that for some two years before he was injured, the plaintiff's testator had been employed by the defendant, either to truck freight or as a sealer, and was familiar with the arrangement of the tracks, the making up of trains and movements of cars and of switching engines in and through the freight house. From his declarations, which were put in evidence, it could have been found, that, while he was standing on a ladder resting on the space between the tracks engaged in sealing the door of a car on the first track, a switching engine, without any warning having been given, and whose entrance and approach he did not observe, ran in on the back track, and by striking the ladder caused him to fall to the ground, over which he was dragged for some distance receiving the injuries for which damages are sought.

We are of opinion that under these conditions the plaintiff cannot recover.

There is no evidence of any defect in the ways or instrumentalities used, and in the general management of its road the defendant had the right to construct and equip its freight house and to conduct its business in the manner described.

It is not contended that the decedent was not possessed of ordinary powers of observation sufficient to enable him in the light of his experience to understand and fully appreciate the dangers incidental to the environment in which he was employed. The peculiar perils to which he was exposed in sealing cars on the first track, whether arising from insufficient light or the passing of cars or engines, were not only obvious but must have been known to him, and he also knew or ought to have known that, if his fellow servants negligently failed to give warning of an approaching car or engine, he was exposed to great danger as they passed, on account of the probability of their coming into contact with the ladder on which he must

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stand while at work. By continuing in his employment under these circumstances he must be held to have taken the chance of any injury which might follow if he failed to take ordinary precaution to guard himself against the danger which caused the accident. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511. *Duffy* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 28. *Regan* v. *Lombard*, 192 Mass. 319. *Pembroke* v. *Cambridge Electric Light Co.* 197 Mass. 477.

Exceptions overruled.

H. C. Long, (*F. W. Campbell* with him,) for the plaintiff.

A. R. Tisdale, for the defendant, submitted a brief.

MORRISON COMPANY *vs.* HENRY BIGELOW WILLIAMS.

Suffolk. November 13, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Mechanic's Lien. Lis Pendens. Practice, Civil, Plea in abatement. *Contract,* Construction, Building contract.

Although one, to whom there is due from the owner of real estate a debt of the kind described in R. L. c. 197, relating to mechanic's liens, can have but one satisfaction of the debt, under § 88 of that chapter he may maintain against such owner at the same time an action of contract for the debt and a petition to enforce the lien to secure its payment.

A building contract contained as successive paragraphs in one article a paragraph providing for the making by the contractor to the architect of monthly statements of the amount in value of labor and materials provided and used in the erection of the building, and for the issuing by the architect of certificates for the payment of a certain percentage of such amount or of so much thereof as the architect deemed best, a paragraph which read as follows: "Final settlement to be made forty days after the full completion of said building and its acceptance by the architect," and a paragraph which read: "Provided, however, that in each of said cases of payment, if required, the . . . [contractor] . . . shall present a certificate from the clerk of the office where liens are recorded, signed by said clerk, to the effect that the works and estate are, at the time said payments are due, free from all liens or claims chargeable to the said" contractor. The contractor filed a petition under R. L. c. 197, to enforce a lien for the final payment alleged to be due him under the contract. The respondent filed an "answer in abatement," setting forth the above provision of the contract, alleging that there were a number of liens filed against the property for claims

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chargeable to the contractor, petitions to enforce some of which were pending, and that the contractor had not presented the certificate as to liens called for by the contract, but containing no allegation that the certificate as to liens had been required by him. The petitioner demurred to the answer. *Held*, that the demurrer must be sustained, since the provision as to the certificate relating to liens did not have to do with the final payment, and since it did not appear that the owner had required the presentation of the certificate by the contractor.

PETITION for the enforcement of a mechanic's lien, filed in the Superior Court for the county of Suffolk on July 15, 1907.

The respondent filed an "answer in abatement" to which the petitioner demurred, as stated in the opinion. *Gaskill*, J., sustained the demurrer after a hearing, and reported the case for determination by this court.

C. F. Kittredge, for the petitioner.

R. F. Sturgis, for the respondent.

KNOWLTON, C. J. To this petition for the enforcement of a mechanic's lien the respondent filed a plea in abatement, averring first, that the petitioner had previously brought an action of contract, which was still pending, for the collection of the same indebtedness, and secondly, that there was a provision in the contract in regard to the existence of other liens or claims upon the property chargeable to the petitioner, which was a cause for the abatement of the petition. The questions come before us on a demurrer to this plea.

1. The statute provides that one may maintain an action of contract for a debt of this kind, and at the same time have the benefit of the provisions of law for the enforcement of a lien upon the land and building. R. L. c. 197, § 33. This is the meaning of the prior statutes covering the same subject in similar language. R. S. c. 117, § 33. Gen. Sts. c. 150, § 40. Pub. Sts. c. 191, § 46. That this is the proper interpretation of the provision was decided in *Angier* v. *Bay State Distilling Co.* 178 Mass. 163, in which the decision was not made upon a question of pleading, but upon substantive grounds. Of course the petitioner can have but one satisfaction, but he may pursue both remedies until he obtains satisfaction in one of them, so long as his action in one proceeding is not in conflict with that in the other.

2. An article in the contract provides for the making of monthly statements, by the contractor to the architect, of the

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amount in value of labor and materials provided and used in the erection of the building, and for the issuing by the architect of certificates of payment of eighty per cent of such amount, or of so much as he deems just. The next paragraph is in these words: "Final settlement to be made forty days after the full completion of said building and its acceptance by the architect." Then in another paragraph is the following: "Provided, however, that in each of said cases of payment, if required, the said party of the first part shall present a certificate from the clerk of the office where liens are recorded, signed by said clerk, to the effect that the works and estate are, at the time said payments are due, free from all liens or claims chargeable to the said party of the first part." *

The plea in abatement sets up this last quoted provision, with an averment that no certificate was furnished under it. It contains no averment that any certificate was required. It is also averred that there are liens of certain persons filed against the property for labor and materials used in the erection of the building, and that petitions for the enforcement of some of these liens are pending.

These averments furnish no ground for the abatement of the petition. In the first place we are of opinion that the quoted provision does not apply to the final settlement, to be made forty days after the completion of the building, but only to the payments to be made monthly, according to the earlier requirement of the contract. Secondly, the failure to furnish a certificate when none was required would not affect the petitioner's right.

The postponement of the settlement until forty days after the completion of the building was undoubtedly intended to enable the owner to ascertain whether there were liens upon the building, and to protect himself from them. But this part of the contract does not preclude the petitioner from bringing a petition or suing out a writ for the recovery of the amount due him. In determining the amount to be paid him, if he had failed to pay for labor and materials included in his contract,

* These three paragraphs were consecutive parts, unnumbered, of one article in the contract.

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and had left them to be paid for out of the owner's property through the enforcement of a lien, that fact would be taken into account. The rights of the respondent in this particular would be protected by the court.

Case to stand for trial.

LOUISA E. WELSH *vs.* MILTON WATER COMPANY.
JAMES WELSH *vs.* SAME.

Suffolk. November 13, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, New trial.

An order of a trial judge setting aside a verdict as against the evidence, upon a motion in writing to set it aside for that reason, is final, and is in no wise invalidated or affected by further ordering the setting aside of certain specific findings of the jury on material issues submitted to them, as by the setting aside of the general verdict the whole case is reopened for a new trial, and the specific findings become void, whether any reference is made to them in the order or not.

TWO ACTIONS OF TORT, the first by a married woman to recover damages for lead poisoning alleged to have been caused by the use of drinking water furnished by the defendant, and the second by the husband of the plaintiff in the first case for the expenses of her illness and the loss of her society. Writs dated respectively August 4, 1902, and April 24, 1907.

In the Superior Court the cases were tried together before *Bond*, J. The jury returned a verdict for the plaintiff in the first case in the sum of $3,000 and a verdict for the plaintiff in the second case in the sum of $1,500.

Special questions were submitted to the jury and were answered by them as follows:

1. "Did any of the officers of the defendant company know prior to the time when Mrs. Welsh ceased to take the water, that the water furnished to the house where Mrs. Welsh lived was of such a character that it was dangerous to drink after it had passed through the lead service pipe in the house where she

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lived, by reason of lead which might be contained in solution in such water?" The jury answered "No."

2. "If the officers of the defendant company did not know prior to the time when Mrs. Welsh ceased to use the water that the water furnished to the house where Mrs. Welsh lived was of such a character that it was dangerous to drink after it had passed through the lead service pipe in the house where she lived, by reason of lead which might be contained in solution in such water, were said officers negligent during the year 1900 in not ascertaining about the quality of such water and the liability of its containing lead from its contact with the lead service pipes?" The jury answered "Yes."

3. "If the officers of the defendant company did not know prior to the time when Mrs. Welsh ceased to use the water that the water furnished to the house was of such a character that it was dangerous to drink after it had passed through lead service pipes in the house where she lived, by reason of lead which might be contained in solution in such water, were said officers negligent during the year 1901, and prior to the knowledge of the first case of lead poisoning in Milton in that year in not ascertaining about the quality of such water and the liability of its containing lead from its contact with the lead service pipes?" The jury answered "Yes."

After verdict the defendant made a motion for a new trial in each case on the following grounds:

"First. That the verdict was against the evidence in the case.

"Second. That the verdict was against the weight of the evidence in the case.

"Third. That the jury was influenced and prejudiced in favor of the plaintiff by incompetent, irrelevant and immaterial testimony offered by the plaintiff in the presence of the jury and excluded by the court, and by reason of such prejudice found for the plaintiff.

"Fourth. Because the jury disregarded the instruction of the court as to the law applicable to the issues involved between the parties."

After a hearing the judge granted the motions, entering the following order in each case:

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"The officers of the defendant company having relied upon the State board of health to notify them if there was anything unsafe in the water supplied by the defendant to its water takers and not having received any notice from the State board of health that it was unsafe cannot properly be held to have been negligent in not ascertaining that the water was unsafe. I therefore set aside the verdict as being against the evidence and set aside the second and third special findings of the jury."

The plaintiffs excepted to the foregoing order alleging that it constituted a ruling as a matter of law, and to the order setting aside the second and third findings of the jury and the verdict, and to the statements made in the order, alleging them to be a ruling as a matter of law.

The following statement was included in the bill of exceptions: "There was evidence to support the special findings and verdict of the jury as above unless the defendant was relieved from liability by its reliance upon the State board of health as set forth in the evidence."

J. P. Fagan, (*J. E. Cotter* with him,) for the plaintiffs.

F. Rackemann, (*R. W. Dunbar* with him,) for the defendant.

BRALEY, J. It is provided by R. L. c. 173, § 112, that "the courts may, at any time before judgment, set aside the verdict in a civil action and order a new trial for any cause for which a new trial may by law be granted; but a verdict shall not be set aside except upon a motion in writing by a party to the cause, stating the reasons relied upon for its support." But, while the decision of the court must be confined to the reasons stated, whether a new trial shall be granted is wholly discretionary, and to the exercise of his judicial discretion by the trial judge no exception lies to this court. *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223, 230. *Reeve* v. *Dennett*, 137 Mass. 315, 318. *Shanahan* v. *Boston & Northern Street Railway*, 193 Mass. 412, and cases cited.

The defendant's motion, among other reasons, alleged that the verdict was against the evidence and the weight of the evidence, and in the memorandum the order was distinctly put upon this ground. It is the order setting the verdict aside, based upon the grounds stated in the motion, which vacates the verdict, not the reasons of decision, whether stated orally or reduced to writing

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and filed in the case. *Boyd, petitioner*, 199 Mass. 262. The plaintiffs, however, while recognizing this, strongly urge that the scope of the order went farther, because certain specific findings made in their favor by the jury on questions submitted to them involving important issues, are also specifically set aside. But the contention is not well founded, for, if no such reference had been made or order entered, when the general verdict in their support fell and the whole case had been reopened for a new trial, these findings fell with it. *Hawks* v. *Truesdell*, 99 Mass. 557. *Monies* v. *Lynn*, 119 Mass. 273. *Hart* v. *Brierley*, 189 Mass. 598, 604. *McCrum* v. *Corby*, 15 Kans. 112, 117.

Exceptions overruled.

JEANNETTE F. EASTMAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 17, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Witness, Cross-examination, Impeachment. *Evidence*, Remoteness.

The extent to which the cross-examination of a witness shall be permitted to be carried is within the discretion of the presiding judge, and in its exercise the judge may exclude questions addressed to a plaintiff on cross-examination relating to matters whose connection with the issues on trial is too attenuated and remote for consideration.

In this Commonwealth it is settled law that, in the introduction of evidence affecting generally the credibility of a witness, the inquiry is limited to the reputation of the witness for truth and veracity, and, therefore, after a witness for a defendant has testified that he knows the reputation of the plaintiff for truth and veracity and that it is bad, it is proper for the presiding judge to refuse to allow the defendant to ask the witness whether he would believe the plaintiff under oath.

TORT for personal injuries from an alleged assault and battery by a conductor of the defendant in grabbing and wrenching the plaintiff's arm. Writ dated August 29, 1906.

At the trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff in the sum of $700; and the defendant alleged exceptions, relating only to the exclusion by

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the judge of two questions asked by the defendant, one upon the cross-examination of the plaintiff and the other upon the direct examination of one McGarr, an inspector of police, called as a witness by the defendant. The questions excluded are stated in the opinion.

The case was submitted on briefs.

F. F. Collier, for the defendant.

C. A. McDonough, for the plaintiff.

MORTON, J. The injury for which the plaintiff sought to recover was to her arm. In the course of her cross-examination by the defendant it appeared that the plaintiff was married nine years, that her husband was dead, and that she had been a widow eleven years. It also appeared that menstruation came on immediately after the accident, about a week "ahead of time." Thereupon she was asked this question, "Have you ever had any miscarriages since you were married? . . . I mean during your marriage." The question was excluded and the defendant excepted. It is enough to say that its exclusion was plainly within the discretion of the presiding judge as to the extent to which the cross-examination should be permitted to go. It was possible of course that there might be a connection between the injured arm and premature menstruation and miscarriages which occurred from eleven to twenty years before the accident. But, if there was, it was too attenuated and remote for consideration.

The defendant was allowed to ask a witness called by it whether he knew what the reputation of the plaintiff for truth and veracity was, and, upon his answering that he did, to ask him what it was, and the witness replied that it was bad. Thereupon the defendant asked the witness, "Would you believe her under oath?" On the plaintiff's objection the question was excluded and the defendant excepted. Whatever may be the rule in England and in some other jurisdictions in this country, we regard it as settled in this Commonwealth that in the introduction of evidence affecting generally the credibility of a witness, the inquiry is limited to his reputation for truth and veracity. *Wetherbee* v. *Norris*, 103 Mass. 565. *Commonwealth* v. *Lawler*, 12 Allen, 585. *Quinsigamond Bank* v. *Hobbs*, 11 Gray, 250, 257. *Commonwealth* v. *Moore*, 3 Pick. 194, 196. This rule it is said in 30 Am. & Eng. Encyc. of Law, (2d ed.) 1075,

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" is well supported by authority as well as reason," and a large number of cases is cited. See also *Teese* v. *Huntingdon*, 23 How. 2; 1 Greenl. Ev. § 461.

Exceptions overruled.

UNION TRUST COMPANY *vs.* JOHN HASSELTINE.

Suffolk. November 18, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Pledge, Of mortgage. *Trust.* *Mortgage*, Of real estate.

A pledgee of a mortgage of real estate, regularly assigned to him, may foreclose the mortgage for a breach of condition, if he deems such action to be best for the interests of himself and of the pledgor, and may exercise a power of sale contained in the mortgage and purchase the property at such sale if under the terms of the mortgage an assignee of the mortgage has a right to do so, but after such a purchase he holds the property as trustee for the pledgor and subject to redemption by him on payment of the debt which the mortgage was pledged to secure.

CONTRACT to recover the balance alleged to be due upon a certain promissory note signed by the defendant, payable to the plaintiff, with which three mortgages for $3,000 each had been deposited by the defendant with the plaintiff as collateral security therefor. Writ in the Municipal Court of the City of Boston dated November 26, 1907.

On appeal to the Superior Court the case was tried before *Crosby*, J. The plaintiff introduced the note with the indorsements thereon, and rested.

The defendant then offered to prove the following facts: That originally the defendant deposited with the plaintiff three mortgages for $3,000 each; that all of these mortgages were given by one Gould to one Pilling and by Pilling were assigned to the defendant through mesne assignments, and that the defendant at the time he pledged the mortgages to the plaintiff was the owner and holder of them; that afterwards two of the mortgages were sold by consent of the parties for $6,000, the payment of which sum was indorsed upon the note in suit, so that thereafter the plaintiff held the remaining mortgage as collateral security for the balance due on the note sued on; that on or about Octo-

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ber 2, 1907, the plaintiff holding the mortgage for $3,000, having previously advertised the property covered by it, sold it upon foreclosure proceedings under the terms of and for breach of the conditions of the mortgage, and bid it off for the sum of $2,450; that it was bid off in the name of one Brooks, at the request of and for the benefit of the plaintiff; and that immediately on the same day Brooks made a conveyance of the property to the plaintiff, no consideration being given by Brooks; that a printed notice of the foreclosure proceedings giving the time and place of the sale was sent to the defendant; that the plaintiff did not sell the mortgage in question under the terms of the note sued on and took no proceedings to sell the mortgage or the note accompanying it under the terms of the note sued on; that, having bid in the mortgaged property, the plaintiff indorsed upon the note in suit the payment of the sum of $2,398.53, that being the alleged net proceeds of the foreclosure sale; that the plaintiff held the title to the lot of land so purchased from the time it bid it in at this foreclosure sale until April 4, 1908, when, without notice to the defendant or previous demand, it sold the land in question to one Hunt at a grossly inadequate price; that this last sale was not made in good faith, and that the value of the property, if sold at its fair market value, would have been more than enough to pay the amount due from Hasseltine to the plaintiff, that is to say, more than $3,000, with the interest, costs and expenses.

The defendant did not question the good faith of the plaintiff in making such foreclosure sale, and did not question that it was made in accordance with the terms of the mortgage, there being a breach as between the mortgagor Gould and the plaintiff, the assignee of the mortgage. All of the mortgages were in the usual form and purported to be first mortgages with the usual power of sale contained therein.

After having made the foregoing offer of proof the defendant asked the judge to make the following rulings:

"1. The plaintiff had no right to foreclose the mortgage and bid in the property covered by said mortgage.

"2. The plaintiff, as pledgee of the mortgage on lot 1651, had no right to become the purchaser either at foreclosure sale under the terms of the mortgage or become the purchaser of the mort-

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gage under the terms of the note, as a pledgee cannot, unless under a special power in the note, become the purchaser of the property at any sale.

"3. After the plaintiff had foreclosed the mortgage and purchased the property covered by the same, he still held said property as security for the defendant's note, and in trust for the defendant.

"4. The plaintiff had no right to sell the property in question after the foreclosure proceedings, without giving the defendant due notice of any such proposed sale, and the plaintiff, being a trustee for the defendant of said property and holding the same in trust for him, was bound to get the largest possible price and use the utmost good faith in disposing of said property.

"5. The plaintiff, having purchased or caused to be purchased the property at foreclosure sale, thereafter held the same in trust for the defendant, and the plaintiff had no right to sell said property under the terms of its note, because the defendant had a right to redeem said property at any time within three years after the date of such purchase.

"6. The sale of the property in question under the terms of the mortgage was, so far as this defendant is concerned, null and void, as the note sued on did not give the plaintiff a right to foreclose said mortgage nor to become the purchaser of such property, and any such proceedings as were taken or attempted to be taken by the plaintiff were of no force or effect so far as it related to the defendant."

The judge refused to give any of these rulings, and ordered a verdict for the plaintiff in the sum of $972.14. The defendant alleged exceptions.

The case was submitted on briefs.

C. F. Eldredge, for the defendant.

W. Howland & C. A. Warren, for the plaintiff.

KNOWLTON, C. J. The defendant pledged to the plaintiff three mortgages, as collateral security for the payment of his promissory note. The contract of pledge gave the plaintiff "full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any addition thereto, at any brokers' board, or any public or private sale, at the option of said trust company or its

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president or treasurer, or its or their or either of their assigns, and with the right to be the purchasers themselves at such brokers' board, or public or private sale, on the non-performance of this promise, . . . without advertisement or notice." The questions before us arise on the action of the plaintiff upon one of these mortgages. This mortgage the plaintiff foreclosed, by a sale under a power in the mortgage, for a breach of the condition thereof. It is agreed that this sale was made in good faith, and in accordance with the terms of the power. The plaintiff, through a third person, became the purchaser at the sale, and took from him a transfer of the property, which we assume was done under the authority of the power. The defendant was sued in this action for a balance due upon his debt to the plaintiff, and he offered to prove that the plaintiff acted in bad faith in disposing of the property acquired under the foreclosure, and sold it for much less than it was worth. He claimed an allowance upon the note for its value.

The first question is whether the plaintiff could make a valid foreclosure of the mortgage under the power of sale contained therein. It was an assignee of the mortgage, and was within the terms of the power given by the mortgagor. As the holder of the mortgage title it had the right to foreclose, unless restrained by the terms of its contract with the defendant as pledgor. The contract was silent on this point. The broad power to sell the pledged property did not in itself give a right to foreclose the mortgage. But the pledgee of property has the control of it for the time being, and he represents not only his own interest, but that of the pledgor, in taking any proper action for the preservation of it and the collection and care of its proceeds. If the pledged property is a promissory note or other evidence of debt, he may collect it when it becomes due. If it is stock in a corporation he may collect the dividends. If it is a mortgage upon land and regularly assigned to him, he may foreclose the mortgage for a breach of the condition, if he deems such action best for the interests of himself and the pledgor. 22 Am. & Eng. Encyc. of Law, (2d ed.) 895, 896, and cases cited. The right of a pledgee to foreclose a mortgage is recognized in this Commonwealth, although most of the cases

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show a foreclosure by an entry and possession, rather than by a sale. *Brown* v. *Tyler*, 8 Gray, 135. *Stevens* v. *Dedham Institution for Savings*, 129 Mass. 547, 549. *Montague* v. *Boston & Albany Railroad*, 124 Mass. 242, 245. The language in the case of *Lord* v. *Hartford*, 175 Mass. 320, in which it was held that a pledgee "is precluded from buying the property pledged at a foreclosure sale, on the ground that his duty to the pledgor is inconsistent with his interest as a purchaser," was used of a purchase in reference to the right acquired under it as against the pledgor. He cannot take the title by virtue of the purchase at the auction sale and hold it absolutely, as against the pledgor. If he buys, he takes the title as a trustee for the pledgor, and holds it subject to redemption by him on the payment of the debt for which it was pledged. It was not intended to intimate that his right to foreclose, under the power, by virtue of his title as holder of the mortgage, does not enable him to buy it at the auction sale to prevent the sacrifice of the property, if the power in the mortgage gives such a right. If he does this, as was held of a similar foreclosure by possession in each of the cases above cited, he holds as a trustee for the pledgor, as well as for his own security. It was decided otherwise upon the facts in *Jennings* v. *Wyzanski*, 188 Mass. 285, 289, because, by the terms of the pledge, he was expressly authorized, not only to foreclose the mortgage but to purchase at the foreclosure sale. This, as between the pledgor and pledgee, was held to give the pledgee a right to buy for himself at the sale.

It follows that the plaintiff, after the foreclosure, held the real estate in trust for the defendant, and it had no right to sell it without regard to his interests. The terms of the contract of pledge gave it no right to make such a sale as that which the defendant offered to prove. The third instruction requested should have been given.

Exceptions sustained.

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FRED A. HOUDLETTE & another *vs.* WILLIAM C. DEWEY.

Suffolk. November 19, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction. *Sale*, Delivery.

A contract with an architect to import for him from Europe certain steel beams and deliver them to a structural company, having its works at Everett, with which the architect has a contract to work the beams into a desired shape, containing the words "Terms: Cash by sight draft against invoice and delivery to [the structural company] at Boston," is complied with by a delivery of the beams on the wharf in Boston and notifying the corporation of their arrival, and on such delivery and notification the title passes to the buyer, leaving the importer under no obligation to transport the beams from the wharf in Boston to the works of the structural company in Everett, unless he is paid an additional sum for doing so.

CONTRACT to recover a balance alleged to be due for a quantity of steel beams, for the labor of cutting them and the expense of transporting them from Boston to East Everett. Writ dated November 17, 1902.

In the Superior Court the case was tried before *Holmes*, J., without a jury. The plaintiffs' claim was based on a proposal in writing and its acceptance as set forth in their declaration. The proposal was made by letter, and, with the acceptance indorsed thereon, was as follows:

"Boston, July 29, 1902.

"Mr. Wm. C. Dewey,
New York, N. Y.

"Dear Sir:

"We propose to furnish and deliver to the New England Structural Company, Boston, a schedule of steel beams as per their sheets, Nos. 1 to 11, inclusive, and the small schedule for New York, amounting to about 275 tons, for the sum of $2.05 base, including duty and wharfage in Boston or New York for beams up to and including 15″; larger sizes usual extras, $2.50 per ton.

"Terms: Cash by sight draft against invoice and delivery to New England Structural Company at Boston and on dock in New York, you to advance $3,000 in cash (as an evidence of

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good faith) the same to be applied against the payment of our last delivery of beams.

"Delivery: Shipment of the entire schedule from Europe to be made within four to six weeks from this date. It is understood that this contract is accepted and the sale made subject to delays brought about by strikes, fires or causes beyond our control.

"Yours very truly,
"Fred A. Houdlette & Sons."

"Accepted July 31, 1902.
"Wm. C. Dewey."

The findings of the judge made the subsequent correspondence immaterial.

At the close of the evidence the defendant asked the judge to rule that the plaintiffs were not entitled to recover anything for the expense of transporting the beams from Boston to Everett. The judge refused so to rule, but ruled and found that the plaintiffs were entitled to recover $87.90 for transportation, and further ruled and found that if the plaintiffs should amend their declaration by adding thereto a count for the expense of transporting 353,589 pounds of beams from Boston to Everett the plaintiffs would be entitled to recover in addition thereto the expense of transportation at the same rate of five cents per hundred pounds. The plaintiffs so amended their declaration, and afterwards a finding was entered for the plaintiffs for the sum of $668.03, which included the full amount claimed by plaintiffs for transportation. The defendant alleged exceptions, which after the death of *Holmes*, J., were allowed by *Gaskill*, J.

E. M. Brooks, for the defendant.

J. Cavanagh, for the plaintiffs.

BRALEY, J. The declaration as amended contained two counts the first declaring for the balance of an account due under the contract, the second, on an account annexed in which the balance was itemized. At the trial, the other items having been either admitted, or not seriously contested, the controversy seems finally to have been narrowed to the charge for transportation, and the exception to the refusal to rule, that under the

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contract the plaintiffs could not recover therefor, presents the only question to be decided.

The plaintiffs' letter to the defendant, with his acceptance, constituted the contract, and in view of the findings of the judge, which were supported by the evidence, that it had not been varied by their subsequent telegrams, letters and interviews, their respective rights rest upon its construction. It may be gathered from the exceptions, which are extremely meagre in regard to any clear description of the parties or their situation at the time, that the defendant, who was an architect residing in another State, intended to use the steel beams, after they had been properly fitted in the erection of a building either owned by him or being built under his supervision. The plaintiffs engaged to import the beams and deliver them to the New England Structural Company, by whom under a separate contract with the defendant they were to be wrought into the desired shape. But, in fact, the works of the New England Structural Company were at Everett, and, as that company refused to accept delivery of the beams at the wharf, the plaintiffs paid for transportation to the works for all the shipments, and demanded reimbursement from the defendant. The defendant's agreement with the company does not appear, nor is it important, for, upon recurrence to the contract, it will be seen that the plaintiffs became bound to deliver only "at Boston," the place designated by the buyer, and when the beams were landed on the wharf and the company had been notified, the plaintiffs had performed their contract, and the title then passed to the defendant. *Chickering* v. *Fowler*, 4 Pick. 371. *Lucas* v. *Nichols*, 5 Gray, 309. *Nichols* v. *Morse*, 100 Mass. 523. *Peck* v. *Waters*, 104 Mass. 345. *National Bank* v. *Dayton*, 102 U. S. 59. *Smith* v. *Chance*, 2 B. & A. 753, 755.

In payment for the shipments as they arrived, and upon making delivery, sight drafts were to be drawn upon the defendant against the invoices. But as the company would not receipt unless the beams had been actually received, after about two thirds had arrived and were on the wharf, the plaintiffs telegraphed the defendant of the refusal and asked for instructions. If the telegram, his letter in reply, and the telegram and the letter sent to him the following day, to which no answer was

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received, are read in connection with his oral testimony in reply to questions put by the judge, there was evidence which warranted the judge in finding that the defendant understood that the plaintiffs were to transport the beams to the mill of the company for his benefit and at his expense. The plaintiffs, therefore, having made the necessary outlay, were properly found entitled to recover the amount upon the account annexed. *Massachusetts Mutual Ins. Co.* v. *Green*, 185 Mass. 306. *Foote* v. *Cotting*, 195 Mass. 55, 62, 63.

Exceptions overruled.

LEORA C. SKINNER *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. November 20, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Causing death.

At the trial of an action under R. L. c. 106, § 71, cl. 3, § 73, against a railroad company by the widow of one who, while employed by the defendant, was struck and instantly killed by a train of the defendant, there was evidence tending to show that the plaintiff's husband had been employed by the defendant for four days and in the course of his duties had just placed mail upon a train at a station of the defendant and had nine minutes in which to go to a postoffice one hundred and fifty yards distant, procure mail for another train and return, that in going to the postoffice it was necessary for him to cross double tracks of the defendant over which trains going in both directions frequently passed, that the defendant maintained a gong near the station which was rung when a train, going in the direction opposite to that in which the train that the deceased had just left was going, approached the station, that the day was stormy with rain and sleet and, in crossing the tracks, the plaintiff's husband, pushing a handcart furnished him by the defendant, followed some passengers who had just left the train and walked with his head slightly bent forward, looking down and straight ahead, when, without any gong being rung or the bell or whistle upon the engine being sounded, a train, approaching at the rate of thirty miles an hour from the direction that the train which he had just left had gone, struck him and he was instantly killed. *Held*, that as a matter of law the plaintiff's husband was not in the exercise of due care in placing himself in a position of great danger without giving any attention to his surroundings.

TORT under R. L. c. 106, § 71, cl. 3, § 73, by the widow of one Elwyn S. Skinner, who was alleged to have been instantly killed by being struck by a train coming from Boston while he was employed by the defendant at its Winter Hill station in

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Somerville. Writ in the Superior Court for the county of Middlesex dated January 11, 1907.

At the trial in the Superior Court before *Hardy*, J., besides the facts stated in the opinion, there was evidence tending to show that the defendant was accustomed to have a gong rung near the station as a train approached it from Boston, but that no gong rang to announce the approach of the train that struck the plaintiff's husband. There also was evidence that the bell of the locomotive engine was not rung, and that the train, when it struck the plaintiff's husband, was going thirty miles an hour, which was its usual rate of speed at that point.

The following rule of the defendant was put in evidence: "Approach stations carefully to avoid any risk of accident, and in no case draw up to or pass a station where a train is taking or leaving passengers."

There also was the following evidence as to the weather at the time of the accident: "It had rained during the morning and the rain had just turned to snow. The snow came in large flakes and was driven by the wind so that it drove in the faces of the people crossing going east."

It also appeared that, because of the lateness of the train upon which he had just placed mail, the plaintiff's husband had but nine minutes, if the next train, which he had to meet in the course of his duties, was on time, to go from the station across the tracks one hundred and fifty yards to the postoffice, procure mail for the next train and return.

Other facts are stated in the opinion.

At the close of the evidence the presiding judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

G. S. Littlefield & C. S. Tilden, for the plaintiff.

L. T. Trull & F. N. Wier, for the defendant.

BRALEY, J. This is an action of tort brought by the widow under R. L. c. 106, §§ 71, 73, to recover for the death of her husband, an employee of the defendant, who was struck and instantly killed by a locomotive as he was crossing the tracks at one of its stations in the performance of his duties as a mail carrier. By the statute, unless the decedent if he had survived could have maintained an action, the plaintiff cannot prevail.

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Upon recourse to the evidence it appears that he was employed by the defendant to carry mails between the postoffice and the trains, and for this purpose used a small, two wheeled handcart provided by the railroad, which he pushed before him as he walked. On the day of the accident, after having delivered the mail to the inward bound train, he waited on the platform until it had partly passed over the plank crossing, when he left the platform and started to pass over this crossing to return to the postoffice for the mail which was to go on the outward bound train, and, while he was on the outward bound track, over which he had nearly passed, the locomotive struck him. If a finding would have been warranted, that in the performance of his duties he was expected to cross the tracks and that when killed he was about his work in the usual way, all the witnesses who saw and described the accident agreed, that when struck by the train he was walking, pushing the cart in front, with his head slightly bent forward, looking down and straight ahead. According to common experience, to walk or stand on a railroad track over which, as the decedent knew, notwithstanding his brief experience as an employee,* trains were very often passing, in itself was attended with great danger. But, even if, intent on his work, he may have followed passengers who preceded him, when, without looking to see whether a train was coming or giving any attention to his surroundings, he started across, his conduct must be held to have been so careless as to amount to contributory negligence which bars any recovery. *Barstow* v. *Old Colony Railroad*, 143 Mass. 535. *Cannon* v. *New York, New Haven, & Hartford Railroad*, 194 Mass. 177. *Winslow* v. *Boston & Maine Railroad*, 165 Mass. 269.

Exceptions overruled.

* The plaintiff's intestate entered the defendant's employ on October 29, and was killed on November 2, 1906.

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JOHN A. OELSCHLEGER *vs.* CITY OF BOSTON.

Suffolk. November 20, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Damages, For property taken or injured under statutory authority. *Stony Brook. Statute.*

Under St. 1896, c. 530, authorizing the city of Boston to alter the course of a certain portion of Stony Brook and make for it a new channel, the street commissioners of that city, in making the takings of land and easements necessary for altering the course of the brook, have no occasion to mention the lands of riparian owners on the former course of the brook from which the water is diverted or the water rights of such riparian owners, which necessarily are taken without any such description.

A riparian owner upon the former course of Stony Brook in Boston from whose land the water has been diverted by the action of the street commissioners in altering the course of Stony Brook under authority of St. 1896, c. 530, although no mention of his land or of his rights in the brook is made in the takings of the commissioners, cannot maintain an action of tort for injury to his land from the diversion of the water, because he has a remedy for damages under the statute, which is exclusive, and because the action of the commissioners is lawful.

TORT by a riparian owner on the former course of Stony Brook in Boston against that city, with a first count for wrongfully diverting the waters of Stony Brook from the plaintiff's land and a second count for constructing a sewer through the former bed of the brook. Writ dated July 26, 1902.

In the Superior Court the case was tried before *Pierce*, J. Certain facts were agreed and the jury took a view of the premises. St. 1874, c. 196, and St. 1896, c. 530, were in evidence, and there also was evidence introduced by both parties upon the question of damages, which is immaterial to the question of law raised by the bill of exceptions. The facts which are material to that question are stated in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant on the second count, and no exception was taken to this ruling. The defendant, among other requests, asked the judge to rule that on all the evidence the verdict must be for the defendant on the first count. The judge refused to make this ruling and submitted the case to the jury on the first count.

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The jury returned a verdict for the plaintiff in the sum of $2,674.43; and the defendant alleged exceptions.

P. Nichols, for the defendant.

A. T. Smith, for the plaintiff.

KNOWLTON, C. J. The St. 1896, c. 530, § 1, is as follows: "The city of Boston may alter the course of and make a new channel, covered or uncovered, for Stony Brook in the city of Boston, from a point at or near the Tremont Street crossing of the Boston and Providence Railroad to a point at or near Boylston station on said railroad." Section 2 gives a right to the street commissioners to take "for the purpose aforesaid, any lands in said city which they may deem necessary therefor," and to "take any rights or easements in said brook or in any lands which they may deem necessary," etc. If the taking was otherwise than by purchase, they were required to file in the registry of deeds a description of the lands or rights or easements taken.

Acting under this statute, on April 22, 1897, the street commissioners filed in the registry of deeds a statement of a taking "for the purposes specified in section one of this act." This included the fee of one parcel of land, with easements of the right to use several other parcels, all definitely described, with a reference to two plans on file in the office of the superintendent of streets, one of which is entitled "Plan of Taking for Relocation of Stony Brook Channel and Gatehouse, Columbus Avenue, Roxbury," and the other, "Plan of Taking for the Relocation of Stony Brook, Junction Centre and Amory Streets." This taking was duly filed in the registry of deeds, and the city began the making of a new channel for Stony Brook through these lands immediately, and completed the work and turned the brook into the new channel on October 1, 1897. In the parcels in which easements only were taken, there was a reservation to the owners of the "right to erect and maintain buildings over and upon said brook, and to use the waters of said brook, so far as said acts may not obstruct the free flow of said waters, it being the intention of this taking to acquire merely the right to improve the channel of said brook."

These parcels included land on both sides of the brook, beginning at a point a considerable distance up the stream from the

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land of the plaintiff, who was a riparian proprietor further down, and extending away from the line of the brook, so that a new channel through the land would take the brook a considerable distance from its former course, away from the land of the plaintiff. In this part the brook in its original channel was crooked and winding. In passing to the plaintiff's land it made a curve, a considerable distance away from its general direction towards the Boylston station. The land and the easements through these several parcels were taken for the purpose specified in §1 of the act, namely, to alter the course and make a new channel for Stony Brook, from a point at or near the Tremont Street crossing of the railroad to a point at or near Boylston station on the railroad. Under the taking the land could be used for no other purpose. Under the statute the taking was an appropriation of the land to this use, which necessarily involved a material change in the course of the brook. This would take away the flow of the stream from the land of riparian proprietors below, until it entered the old channel again, near Boylston station. It was manifest that the land of the plaintiff would be deprived of the flow of the stream as a necessary result of the taking, and of the appropriation of this land to the use specified in § 1. In estimating damages to any one whose property is injuriously affected by a taking of land for a public use, the nature and effect of the use are always considered. A taking for one use may have no detrimental effect upon an estate near by, while a taking for another use may cause special and peculiar damages to such an estate.

The question here is whether this taking by the city gave it a right to use the land for a new channel of the brook, and gave the plaintiff a right to recover damages, under the statute, for this alteration of the course of the brook. We are of opinion that it did. It deprived the plaintiff of the water that previously flowed through his land. The taking of the land for this purpose, coupled with the authority of the city under the statute to use it for this purpose, made it certain from the time of the taking that this alteration of the brook would follow, and would divert the water from the plaintiff's estate. Accordingly he could recover damages under the statute for the taking for this authorized purpose.

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The contention of the plaintiff is that the city ought to have gone further and have taken the plaintiff's right to the waters of the brook by name. But the city did not desire to take the waters of the brook as property, and it had no right, under the statute, to take the waters of the brook so as to become the owner of them. Its only right was to alter the course of the brook, and to take such land, rights and easements as it deemed necessary for that purpose. It took all that was necessary to enable it to make the change, and thereby, under the statute, it acquired, with the easements, a right to use the easements for this purpose. When it acquired these easements for this use and thus appropriated them to this use, its right to change the course of the brook was complete, and it was liable to all persons damaged in their property by the taking, and by the change in the course of the stream that was necessarily included in it. It became the owner of the right to make the change, although it did not seek to become the owner of the water for use. So far as the riparian owners on the stream below had a right of property to have the brook flow through their lands, this right was taken by the action of the city under the statute, which gave it a right to change the course of the brook. In its principles the case is like many others under the water acts, where, by some general act of taking, a right to divert water is acquired which gives proprietors on the stream below a right to recover damages for the injurious effect of the diversion upon their property.

Under most of these statutes it is not necessary, nor is it the practice, to mention the rights of riparian owners below, nor to register a taking of their individual rights, beyond a general statement of the taking of that which, under the statute, authorizes a diversion of the water. See *Northborough* v. *County Commissioners*, 138 Mass. 263; *Ætna Mills* v. *Waltham*, 126 Mass. 422; *Smith* v. *Concord*, 143 Mass. 253; *Howe* v. *Weymouth*, 148 Mass. 605. For cases in which the channel of a brook has been altered or improved, see *Washburn & Moen Manuf. Co.* v. *Worcester*, 153 Mass. 494, and cases there cited; *Morse* v. *Worcester*, 139 Mass. 389, 394; *Washburn & Moen Manuf. Co.* v. *Worcester*, 116 Mass. 458; *Boston Belting Co.* v. *Boston*, 149 Mass. 44; *Boston Belting Co.* v. *Boston*, 152 Mass. 307.

We are of opinion, that the defendant was not called upon to

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refer to the plaintiff's right in the stream, in order to make the taking one that would give it a right to change the course of the brook, and would give the plaintiff a right to damages under the statute. As his remedy was under the statute, in connection with the taking of land and easements by the city for the alteration of the course of the stream, he cannot recover in an action of tort.

Exceptions sustained.

MAX FRISCH *vs.* FRANK E. WELLS.

Essex. November 24, 1908. — January 5, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Sale, Conditional. *Election. Replevin.*

The commencement of an action of contract for a balance due to the plaintiff under a contract of conditional sale of personal property, which provided that the title to the property should not pass to the purchaser until the purchase price had been paid in full, and the arrest of the defendant on mesne process under R. L. c. 168, § 1, in such action on an affidavit that he is about to leave the Commonwealth, constitute an election to treat the sale as an absolute one, and thereafter, although the action of contract is not entered and the defendant is discharged from custody, the plaintiff cannot maintain replevin for the property described in the contract against a third person who has it in his possession.

REPLEVIN of a watch and chain. Writ in the Police Court of Lynn dated January 29, 1906.

On appeal the case was tried before *Fox*, J. It appeared that the watch and chain with five other articles of jewelry were included in the terms of a contract of conditional sale between the plaintiff and one Meyer Krasner. The contract, called a "lease," provided that the price of the articles therein described should be $160, which Krasner should pay by instalments, and, upon payment of the full amount by Krasner, the plaintiff agreed "to give a bill of sale for said goods, and it is mutually understood that in no case shall the title of said goods pass from said Max Frisch, shall they be removed from the above address without written permission, until said amount has been paid and bill of sale given."

Krasner defaulted under his contract after he had paid $94.

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The plaintiff thereupon had him arrested on mesne process under R. L. c. 168, § 1, making affidavit that he believed that Krasner intended to leave the Commonwealth. The declaration which he annexed to the writ was in three counts, the first claiming $66 as "balance due on . . . lease," the third being upon an account annexed for the same balance, and the second setting forth in detail the terms of the contract and the breaches thereof by the defendant.

Krasner was discharged by the judge of the Lynn Police Court upon his taking the oath as prescribed by R. L. c. 168, § 40, that he did not intend to leave the Commonwealth. The plaintiff did not enter that writ. Subsequently this writ of replevin was brought. The defendant is a deputy sheriff who had made an attachment of the watch and chain. The attachment had been discharged before this action was brought.

On the foregoing facts the presiding judge ruled that the plaintiff by his proceedings for the recovery of the price of the goods included in the lease had relinquished his right to reclaim the goods themselves, directed a verdict for the defendant, and at the request of the plaintiff, reported the case for determination by this court.

The case was submitted on briefs.

F. E. Shaw, for the plaintiff.

J. H. Sisk, *W. E. Sisk & R. L. Sisk*, for the defendant.

BRALEY, J. Under the contract, title to the replevied chattels was not to pass to the vendee until the purchase price had been fully paid and a bill of sale given. But, after having paid a part by instalments, his failure to make other payments was a breach which entitled the vendor who had not broken the contract either to treat it as an agreement for goods sold and delivered and to sue at once for the price, or in tort for conversion, or in replevin for their specific recovery. *Bailey* v. *Hervey*, 135 Mass. 172. *Brown* v. *Magorty*, 156 Mass. 209. *White* v. *Solomon*, 164 Mass. 516, 518. *Smith* v. *Aldrich*, 180 Mass. 367, 369. If the first remedy was used it rested upon the theory, that after breach, at the election of the plaintiff, the title passed to the vendee, who received and retained the property. But if the second remedy was resorted to, the remedial right rested upon the assumption, that as the bill of sale had not been given,

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the title still remained in the plaintiff. *Brown* v. *Magorty*, 156 Mass. 209, 211. *Cooper* v. *Cooper*, 147 Mass. 370, 373. These remedial rights, although alternative, were therefore inconsistent, and while the plaintiff had his choice of either, he could not resort to them all. *Snow* v. *Alley*, 156 Mass. 193, 195. Nor is the case of *Miller* v. *Hyde*, 161 Mass. 472, on which the plaintiff relies, in conflict. A majority of the court there held that, without satisfaction, a judgment for the plaintiff in an action of tort for conversion did not vest in the defendant title to the chattels, and as the remedies were consistent, replevin for the horse could be maintained against his vendee. It must be presumed from the record, that, with knowledge of his legal rights and being in possession of the facts, the plaintiff chose to bring suit for the balance due and to arrest and hold the body of the debtor until he was discharged upon taking the oath prescribed by R. L. c. 168, § 40. The plaintiff failed to enter the writ. It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding. *Butler* v. *Hildreth*, 5 Met. 49. *Connihan* v. *Thompson*, 111 Mass. 270. *Bailey* v. *Hervey*, 135 Mass. 172. The answer was a general denial, which put in issue not only the plaintiff's right to possession, but his title to the property. *D'Arcy* v. *Steuer*, 179 Mass. 40, 41. And, the plaintiff having once made an irrevocable election, the title was relinquished or waived, and the present action is absolutely barred. *Bailey* v. *Hervey*, 135 Mass. 172. *Whitney* v. *Abbott*, 191 Mass. 59.

The rulings at the trial were correct, and by the terms of the report judgment is to be entered for the defendant with damages in the sum of $1, and for a return of the goods. *McNeal* v. *Leonard*, 3 Allen, 268.

So ordered.

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EMMA STEVENS, administratrix, *vs.* EDWARD E. STROUT.

Essex. November 5, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

Evidence that a contractor's general superintendent directed K., a mason in the contractor's employ, to "take S. [another mason] and two helpers" and set a capping stone on a corner of the building, and departed, that K. said "Come on, S.," and that then they, with the aid of the two helpers, constructed a staging to use in setting the stone, that K and S. received the same pay and that K. had no authority to hire or discharge employees, will not warrant a finding that K. was one "intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence," within the meaning of R. L. c. 106, § 71, cl. 2.

The mere fact, that, by reason of his experience, one mason employed by a contractor in the erection of a building gave directions to another mason and two helpers working with him on a certain part of the work, does not constitute him one whose sole or principal duty was that of superintendence within the meaning of R. L. c. 106, § 71, cl. 2.

A contractor is not liable, under R. L. c. 106, §§ 71, 72, for injury to an employee or death resulting therefrom, caused by the falling of a staging constructed in the course of their duties by the employee's fellow workmen, although it appears that one of such workmen, by reason of his experience, gave directions in the performance of that particular piece of work, the contractor and his superintendent being absent, and that the staging as constructed was neither safe nor suitable, it not appearing that the contractor failed to furnish proper materials for the purpose or that the sole or principal duty of the fellow workman who gave such directions was that of superintendence.

TORT by the administratrix of one Ervin S. Stevens, who was alleged, while an employee of the defendant, to have received injuries from which after conscious suffering he died. Writ in the Superior Court for the county of Essex dated February 6, 1905.

The injury was alleged to have been received on July 25, 1904. The action originally was brought by Ervin S. Stevens. Upon his death on September 10, 1907, and the appointment of the plaintiff as the administratrix of his estate, she was admitted to prosecute the action, and was allowed to amend the declaration by including counts under R. L. c. 106, § 72, seeking recovery for the death of the intestate after conscious suffering.*

* The questions, whether, where an employee received injuries which gave him a cause of action under R. L. c. 106, § 71, and, after bringing such

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The amended declaration was in five counts, the first seeking recovery for conscious suffering of the plaintiff's intestate, alleged to have been due to negligence of the defendant in failing to supply him with suitable tools and appliances. The second count alleged as the negligence of the defendant the placing of the plaintiff's intestate at work "upon a staging constructed improperly and composed of inadequate, defective and unsafe materials." The negligence of the defendant alleged in the third count was placing the plaintiff's intestate at work in a dangerous place. The fourth count was under R. L. c. 106, § 71, cl. 1, and § 72, for conscious suffering and death of the plaintiff's intestate resulting from a defect in the ways, works or machinery of the defendant. The fifth count, under § 71, cl. 2, and § 72 of the same chapter, set forth as the cause of the injury and death negligence of some person in the service of the defendant intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence.

At the trial, which was before *Sanderson*, J., it appeared that the plaintiff's intestate was a mason employed by the defendant, a contractor, in the building of the Burdett College building in Lynn, and that, while he and one Kallock and two colored men were engaged in putting in place a cap or ornamental stone, a staging upon which they were standing gave way and the stone fell upon the plaintiff, causing the injury which was the basis of this action.

The superintendent in charge of the work was one Arthur L. Strout, the defendant's brother. There was testimony of one Stanton tending to show that the superintendent told Kallock "to take Steve [the plaintiff's intestate] and" two helpers "and start on that corner . . . and after he had spoken to . . . [the superintendent] . . . something about some tools, [the superintendent] told him to go ahead with what he had, and he

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action within a year after the injury, died more than a year after it, his administrator should be allowed to amend the declaration so as to include a count under § 72, and whether the employer under such circumstances would be liable under § 72, were argued by the counsel for both parties on their briefs, but were not decided by the court, because the court held that the evidence would not warrant findings of fact sufficient to maintain an action against the defendant under § 71.

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would get something, whatever it was they were talking about; Mr. Kallock turned around and simply said 'Come on, Steve.' . . . Mr. Stevens asked how he was going to set the stone, and I do not just remember what Mr. Kallock answered, but they went to work directly afterwards to roll the stone up to the building. I saw Mr. Kallock say something to the two colored men. . . . They were all working together. . . . At the time I heard Mr. Strout say what he did to Mr. Kallock, I saw him go in the driveway between the Item building and the Burdett College building," a place distant about thirty feet from where the men were working. "I did not see him again before the accident," which occurred between a quarter and half an hour later.

Kallock, called by the plaintiff, testified in direct examination: "I had a talk with . . . [the superintendent] . . . in reference to laying the stone. He called me out, Mr. Stevens and I, about the work in front of the stone. We went out and looked at the stone and he showed what stone was going on the corner. I looked that over and I saw that it was a Lewis stone, and I made a remark to him we should have to have a derrick to set it with . . . and he said 'Do the best you can and I will try and get you one.' He said 'Here is two laborers, good handy fellows, that will get you what you want to do with, bars, material, etc.' . . . I helped construct the staging. . . . I did not see any crowbars about there. I did not see any horses. I could not say whether there were any jack screws there or not. I didn't see any." On cross-examination he testified: "I had known Mr. Stevens for about five years. His occupation had been the same as mine, namely, mason and bricklayer. He only worked on one job with me before as mason and bricklayer. He worked under me when I was foreman for Mr. Butler. On this job I was paid fifty cents an hour just the same as the rest. . . . I was in no sense a boss. I had no authority to hire or discharge employees."

The superintendent Strout, called by the plaintiff, testified that the plaintiff's intestate and Kallock were getting the same wages. "Kallock and Stevens had worked about three weeks on this building. They were both masons and bricklayers of long experience. Stevens had been in the habit of building

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staging for many years. I don't know about Kallock. He never worked for me before. On the morning when this accident happened there was about that job a large amount of material provided for the construction of stagings, such as planks, horses, and barrels, etc., and nails. In the basement there was no floor. It was dirt. I don't know whether Stevens had worked as a mason setting stone in my employ or not. I don't remember. I left the building of any temporary stagings that might be necessary to the men themselves. Bricklayers and masons on small jobs usually build their own stagings. There were crowbars and jacks about the building."

An experienced mason and contractor, testifying on behalf of the plaintiff, stated that the method used by the workmen in raising the stone in question was not safe or suitable. "Proper utensils to use in setting a stone under circumstances like those in this case would be skids and rollers and bars and pry it along on the sidewalk in the condition it existed until you got within a few feet of your landing place; and then prepare your staging or groundwork, or whatever was necessary to hold it to work it along in place. That would be one way. Another would be to have your derrick to hitch onto it, to drag it in with your derrick, and then set it in with your derrick. There are two or three ways you could handle that stone."

Other facts are stated in the opinion.

At the close of the plaintiff's evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. L. Sisk, (*J. H. Sisk* with him,) for the plaintiff.

R. Spring, (*W. Rand* with him,) for the defendant.

HAMMOND, J. Without reciting the evidence in detail, it is sufficient to say that after a careful reading of it we are of opinion that it does not warrant a finding that Kallock was a superintendent. It is manifest that he acted principally as a workman. Even if it be assumed that by reason of his experience he gave directions in the moving of the stone and in the building of the staging, still that is far from making his sole or principal duty that of superintendence.

There is some conflict of evidence as to whether Stevens, the plaintiff's intestate, assisted in making the staging. Kallock,

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called by the plaintiff, testified that "Stevens was around there; he did nothing in reference to the construction of the staging, only he passed planks from the sidewalk into the cellar," and (on cross-examination) "I should say when a man stood in the position Mr. Stevens was there was nothing to obstruct his vision of the basement; I don't know how long he stood there passing planks; it wouldn't take many minutes to build the whole thing, about fifteen or twenty; I couldn't say that Mr. Stevens was passing plank all the time; we were setting barrels part of the time; and when we were setting barrels nobody would pass plank; we placed barrels and then put planks on them." Stanton testified that when they started in to construct the staging, "Stevens was talking with me; I did not see him pass any plank."

We are of opinion however that upon the whole evidence this must be regarded as a case where the men employed in moving and setting the stone, by the fall of which the injuries to Stevens were caused, were expected to build the temporary staging required for that specific work; that Stevens was one of the gang; and that the negligence in the construction of the staging was that of his fellow workman in not making proper use of the materials furnished by the employer. For the consequences of such a neglect the defendant is not answerable provided he furnished proper materials. *O'Connor* v. *Neal*, 153 Mass. 281. *Thompson* v. *Worcester*, 184 Mass. 354, and cases cited. There was no evidence of a failure on the part of the defendant to furnish proper materials.

Exceptions overruled.

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SARAH A. MacKEOWN *vs.* FRED LACEY, executor.

Essex. November 6, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Bills and Notes. Assignment. Husband and Wife.

The indorsement and delivery of a non-negotiable promissory note operate as an assignment of the note, and under R. L. c. 173, § 4, the indorsee can sue on the note in his own name as assignee.

It is now settled law in this Commonwealth that the marriage of the maker of a valid promissory note to the payee does not extinguish the note or render it void.

MORTON, J. The instruments declared on were promissory notes, though not negotiable, and were given by the defendant's testator to the payee for money lent by her to him before their marriage. Interest was paid on them by him to within a few days of the marriage. After the marriage the notes remained in the possession of the payee, but no interest was paid or demanded. After the testator's death the notes were indorsed by the payee to the plaintiff, and were duly delivered by her to the plaintiff and thereupon this action was brought. No money or other consideration was paid for the transfer of the notes, and the plaintiff was cognizant of the facts in regard to them. The defendant asked the judge * to rule that the plaintiff was not entitled to recover. The judge refused so to rule and found for the plaintiff for the full amount claimed. The case is here on exceptions by the defendant to the refusal to rule as requested and to the finding in favor of the plaintiff.

The indorsements operated as assignments of the notes to the plaintiff, (*Hill* v. *Lewis*, 1 Salk. 132; 2 Ames, Cases on Bills & Notes, 100, n. 1,) and under St. 1897, c. 402, (R. L. c. 173, § 4,) which was in force at the time of the transfer and when the action was brought, the assignee could sue in her own name. The notes were valid in their inception, and whatever may have been the law formerly it must now be regarded as settled in this Commonwealth that the subsequent marriage of the maker and payee did not extinguish them or render them void. *Butler* v.

* *Bond*, J.

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Ives, 139 Mass. 202. *Spooner* v. *Spooner*, 155 Mass. 52. *Chapman* v. *Kellogg*, 102 Mass. 246, and *Abbott* v. *Winchester*, 105 Mass. 115, were disapproved if not overruled in *Butler* v. *Ives*, *supra*. It is still the law that husband and wife are incompetent to contract with each other. *Caldwell* v. *Nash*, 190 Mass. 507. But at the time when these notes were made the parties were not husband and wife and that rule, therefore, does not apply.

Exceptions overruled.

P. R. Clay, for the plaintiff, was not called upon.

J. P. Sweeney, for the defendant.

JOHN HILL & others *vs.* RAUHAN AARRE & others.

Worcester. November 11, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Voluntary Association.

The power of a majority of the members of a voluntary unincorporated society to control the rights or the action of the minority of the members is derived from and is dependent upon the provisions of the constitution and by-laws of the society.

A voluntary unincorporated society had in its by-laws the following provision: "If several motions are made regarding the same question and no unanimous decision can be obtained, said question will be voted on, and the wish of the majority shall prevail, except in the purchase or the sale of real estate, in which case two thirds majority must be the settling vote." The society owned an interest in certain real estate. At a meeting of its members, a majority of the members present voted to enter into union with another society, and at a subsequent meeting, by more than a two thirds vote, voted to transfer the society's real estate to such other organization. A minority voted against both propositions and brought a bill in equity to enjoin the carrying out of the votes. The case was referred to a master, in whose report there was no finding as to the purpose for which the plaintiff's society was organized. *Held*, that, in the absence of any statement as to the purpose for which the society was organized, the by-law above quoted did not authorize the action of the majority of the members objected to by the plaintiffs.

BILL IN EQUITY, filed in the Superior Court for the county of Worcester on February 1, 1906, seeking a conveyance by the defendant corporation, Rauhan Aarre, to the plaintiffs or to some

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persons as trustees for the Young People's Society Wainala of a one third interest in certain property the record title to which was held by that corporation under an agreement with the Young People's Society Wainala to convey to it such one third interest.

The case was referred to a master. After a hearing on his report, *Sanderson*, J., made a final decree directing that the conveyance prayed for be made; and the defendants appealed. The facts are stated in the opinion.

The case was submitted on briefs.

G. R. Warfield & D. I. Walsh, for the defendants.

J. A. Stiles & J. P. Carney, for the plaintiffs.

HAMMOND, J. The parties, having waived certain questions arising under the pleadings, have agreed that the sole question to be submitted to the court is "whether on the facts found by the master (subject to the preceding waiver) the vote of May 5, 1905, by which the Young People's Society Wainala voted to join the Workingmen's Society Imatri No. 3 and succeeding votes were effective and operative against the objecting minority to combine said societies and to transfer said property described in the bill or the right to the said property to the said Workingmen's Society Imatri No. 3." And it is agreed that, if the question be decided in the affirmative, the bill shall be dismissed; if in the negative, then a decree is to issue for the conveyance of the property to a trustee for the benefit of the Young People's Society Wainala.

The property in dispute consists mainly of an equitable interest in a certain undivided part of real estate paid for by the society, the legal title to the whole of which stands in the defendant, Rauhan Aarre, a corporation established under the laws of this State. The Wainala was an unincorporated society, and the power of the majority to control the rights of the minority, or the action of the minority, was determined by the constitution and by-laws. *McFadden* v. *Murphy*, 149 Mass. 341. *Kane* v. *Shields*, 167 Mass. 392. In any case not thus provided for no action could be taken binding all unless assented to by all.

The votes in question provided in substance that the society Wainala should be annexed to the Workingmen's Society and

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the property of the former should be transferred to the latter. The purpose for which the Wainala was organized does not clearly appear in the record, nor are its laws set forth as a whole. So far as appears by the record, the defendants rely upon the following, to wit: "If several motions are made regarding the same question and no unanimous decision can be obtained, said question will be voted on, and the wish of the majority shall prevail, except in the purchase or the sale of real estate, in which case two thirds majority must be the settling vote. Votes can be cast in any way which may seem best for the occasion." But, in the absence of any statement as to the purpose for which the society was organized, this by-law cannot be held to authorize by a majority vote the transfer of the members of the society bodily to another society, to the extinguishment of the former society, especially when, as in the present case, a considerable minority of the old society seeks to maintain its existence. Much less can the property be transferred by such a proceeding.*

The case is settled by the principle laid down in the cases cited above, and the following language of the court in *McFadden* v. *Murphy*, the first of them, is peculiarly appropriate to the present case: "The right to the possession of the property in question was in the original association, and continues in it, unless by its action or the action of its members the right has been transferred to the new association. The property was held under the constitution for the use of the association and its members, and the majority could not transfer it with themselves to another association without violating the trusts upon which it was held and the rights of the minority who remained members."

Decree for the plaintiffs.

* It would seem from the master's report that the vote of the Wainala to transfer itself to the Workingmen's Society was passed by a vote of twenty-two to fourteen; and that the vote to transfer the real estate was passed at a subsequent meeting by a vote of twenty-three to three.

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J. BARTLETTE WHITE, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Plymouth. November 11, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Railroad. Negligence.

R. L. c. 111, § 188, requiring a railroad corporation to cause a bell to be rung or a steam whistle to be sounded continuously for eighty rods on a locomotive engine approaching a grade crossing of a highway, does not apply to an engine with a freight car attached to it backing down from a freight house to be recoupled to a freight train which has stopped after substantially passing the crossing, leaving the end of the last car still extending four feet over it, there being no intention nor attempt to run the train again over the crossing.

If an old man approaches a railroad crossing on a highway, after a freight train has passed over it and has stopped leaving the end of the rear car extending three or four feet into the street at the crossing, and sees the flagman with his flag standing in the street guarding the crossing, and if, with his back turned toward the flagman, he stands on the planking between the rails of the track and engages in conversation with the conductor of the freight train, who is on the platform of the rear car, and, while he is standing in this way within a foot or two of the end of the train, the engine with a car attached to it backs down to be recoupled to the train, and in doing so forces back the train so that the end of the rear car knocks down the old man and injures him, causing his death after conscious suffering, his administrator cannot recover either for his conscious suffering or for his death, as he was not in the exercise of due care.

TORT, by the administrator of the estate of Hira W. Bates, for his death after conscious suffering alleged to have been caused by his being run over at a grade crossing of a highway by a train of the defendant. Writ dated August 10, 1901.

At the trial in the Superior Court before *Harris*, J., the following facts appeared by the evidence:

The injury occurred on May 8, 1901, on Cross Street in Hanover. The plaintiff's intestate was a man seventy-one years of age, bright and active for his age, who for many years had lived near the place where he was injured. It was customary for the defendant to run a freight train over its track from Rockland to Hanover, passing Cross Street every week day. The undisputed evidence showed that Cross Street was a public way, that the defendant's tracks crossed it at grade, and that it was a crossing at which the defendant was obliged by law to maintain signs

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and to cause notice to be given of the approach of its trains by a bell or whistle as required by R. L. c. 111, § 188. The defendant's tracks, consisting of a main track and a side track, run nearly east and west where they cross the road at the place of the accident. Cross Street is forty feet in width, and both tracks are planked substantially the full width of the street. There are no gates at the crossing, but there is a flagman's house on the northerly side of the railroad track and the westerly side of Cross Street.

On the morning of May 8, 1901, the freight train passed over the crossing at Cross Street, going toward the east. One or two cars were cut out from the middle of the train and were sent over the switch, and the rear portion of the train was stopped on the main track, so that the buggy, which was on the rear end of the rear section of the train, projected into Cross Street about three or four feet west of the easterly end of the planking on the crossing.

The engine of the train, leaving the rear portion of the buggy thus projecting a little into Cross Street, proceeded with one car about one hundred and fifty feet east, and stopped opposite the door of the freight station where some freight was discharged from the car. It was after the discharging of this freight, and when the engine and car were going back to take on the rear portion of the train which it had left behind, that the accident happened. When the two parts of the train came together, the buggy was forced back upon the plaintiff's intestate.

The plaintiff's intestate was seen approaching the crossing before the train passed, and, after it had passed and when the buggy was projecting as above stated, he started to cross the street. At that time, one Collamore, the conductor of the train, was standing on the rear platform of the buggy. He engaged the plaintiff's intestate in conversation, and the intestate stood talking with Collamore for about four or five minutes, the intestate being between the rails of the defendant's road and within a foot or two of the buggy's platform on which Collamore was standing. The flagman was stationed on the northerly side of the track, about fifteen feet from the intestate, who was standing with his side toward the car and his back toward the flagman.

One Bailey, the flagman, testified that, while the intestate was

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standing as above stated, the cars to which the buggy was attached were backed down; that the intestate was struck by the buggy, was knocked down and run over; that the intestate was in conversation with Collamore until he was so struck, and that Collamore stood on the platform when the intestate was struck. Bailey testified that he took no part in the conversation between Collamore and the intestate, but stood in the street with his flag, guarding the crossing at the time the accident happened. Bailey heard no signal of any kind given before the cars struck the intestate, and testified that neither he nor Collamore gave the intestate any warning of the starting of the train.

One Mrs. Robbins testified that she saw the intestate standing at the rear of the buggy on the planking, and about one or two feet distant from the buggy; that he was about eighty feet distant from her; that she was standing in the door of her house, the engine being over a hundred feet distant; and that she heard no signal at or immediately previous to the time when the intestate was struck by the cars. The intestate was within the limits of the street when he was talking with Collamore, and he appeared to be talking with Collamore when he was struck.

One Freidman testified that he was getting freight at the South Hanover station, and was near the locomotive of the train which ran over the plaintiff's intestate; that he had been accustomed to get his freight there for three or four years, three or four times a week; that the train usually started ahead without backing, and that it was an unusual thing for the freight train to back across Cross Street; that on the morning of May 8, 1901, no signal was given when the train backed, except a whistle on the fingers given by some one of the trainmen; that at the time the engine and the forward part of the train backed there was a space of over twenty-five to forty feet between that section and the rear section to which the buggy was attached; that no bell was rung or whistle blown at the time the train backed. The train moved swiftly.

The evidence showed that the intestate died at the Massachusetts General Hospital at about eleven o'clock in the forenoon of the day on which he was injured, from the injuries caused by being struck and run over by the cars of the defendant, and that he was conscious until a short time before his death.

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This was all the evidence material to the bill of exceptions.

The defendant offered no evidence, and, at the close of the plaintiff's case, asked the judge to rule that there was no evidence of due care on the part of the plaintiff's intestate; that the provisions of R. L. c. 111, § 268, did not apply to the case in question, and that, if they did, there was evidence of gross negligence on the part of the plaintiff's intestate, and asked that a verdict be ordered for the defendant on the whole evidence. The judge ruled that there was not sufficient evidence to justify a verdict for the plaintiff, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. J. Coughlan, for the plaintiff.

F. S. Hall, for the defendant.

BRALEY, J. This is an action of tort to recover either at common law or under R. L. c. 111, § 188, now St. 1906, c. 463, Part II. § 146, for the conscious suffering of the plaintiff's intestate, and under R. L. c. 111, § 267, now St. 1906, c. 463, Part I. § 63, for his death by reason of the alleged gross negligence of the defendant's servants.

The accident happened at a grade crossing, and the first question is, whether the defendant's failure to sound the whistle or ring the bell on the locomotive was a violation of R. L. c. 111, § 188. It is the purpose of this section, that the signal required should be given continuously for a distance of eighty rods above the crossing, to warn approaching travellers upon the highway of the danger of attempting to cross until the train has passed. But at the time of the accident the freight train had passed with the exception of a part of the buggy, and stopped, while some of the cars had been switched, and, when the engine with one car attached backed down from the freight house to be recoupled, there was no intention of again running the train over the crossing, nor in fact was this attempted. Under these circumstances the statute was inapplicable, and, there being no duty imposed, the failure to give the statutory warning affords no cause of action.

The plaintiff, being left to the counts at common law and for gross negligence, had the burden of proving that his intestate was in the exercise of due care. It is abundantly manifest that as he approached, if he had taken any observation at all of the surrounding conditions which were plainly visible, he must have

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seen the flagman with his flag standing in the street guarding the crossing, and the rear part of the freight train stopped with the buggy partially on the crossing. If, usually, to stand deliberately on a railroad track over which a train is likely at any moment to pass, is considered inexcusable carelessness, the act of the defendant in remaining on the planking between the rails within a foot or two of the buggy with his back to the flagman and entering into conversation for several minutes with the conductor, when, if he had taken any precaution, he must have known that, as the train came together, there might be danger of his being struck by its running back, must be deemed such contributory negligence as to preclude recovery. *Butterfield* v. *Western Railroad*, 10 Allen, 502. *Barstow* v. *Old Colony Railroad*, 143 Mass. 535, 537. See *Granger* v. *Boston & Albany Railroad*, 146 Mass. 276; *Young* v. *Old Colony Railroad*, 156 Mass. 178; *Hudson* v. *Lynn & Boston Railroad*, 178 Mass. 64; *Raymond* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 337; *Ellis* v. *Boston & Maine Railroad*, 169 Mass. 600; *Hamblin* v. *New York, New Haven, & Hartford Railroad*, 195 Mass. 555, 557.

Exceptions overruled.

CORNELIA FROST *vs.* JAMES C. McCARTHY & another.

Suffolk. November 12, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence. Nuisance.

If a woman, on going to a store where she often has transacted business, finds that repairs are going on and that a scaffolding has been built across the front, and enters by a new entrance through a narrow passageway, under the scaffolding, and through a doorway of half the ordinary size, which is reached by ascending two steps and which is open and leads into the store where business is going on, and notices as she goes in mortar or plaster upon the steps, some of which is dry and powdery as though it had been trampled on and spread around, and some of which is in lumps, so that she has to pick her way into the store, and if, after remaining in the store about five minutes, she comes out and slips on the steps, either on the powdery substance or upon a lump, and is injured, she is not negligent as matter of law in having entered the store which she was invited to enter in spite of her noticing the conditions which might cause her to slip, and, in an action against the proprietor of the store for her injuries, the question of her due care is for the jury.

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If the proprietor of a store on one of the principal streets of a large city provides a temporary entrance for his customers, while repairs are going on, and in doing so allows two smooth steps, made of cement and glass set in an iron framework, which lead from a narrow passageway under a scaffolding to a narrow doorway by which the store is entered, to become sprinkled with mortar or plaster, some of which is powdery and some in lumps, and it appears that mortar splashed upon the steps has dried and has been trodden into the store and upon the sidewalk by the feet of persons passing over it, and if owing to this condition of things one of his customers slips on the steps and is injured, in an action brought against him by such customer for the injuries thus caused, the question of the defendant's negligence is for the jury, and there is evidence to warrant a finding that the situation had existed under such circumstances and for such a period of time that in the exercise of reasonable care for the safety of his customers the defendant ought to have known about it.

TORT for personal injuries from slipping upon a step leading from the store of the defendant, as described in the opinion. Writ dated February 17, 1905.

In the Superior Court the case was tried before *Brown*, J. At the trial it was admitted that the defendant McCarthy was the lessee of the store at the entrance to which the plaintiff received her injuries, that he was carrying on his business as usual there on the day of the accident, and that he occupied for his store only the first floor of the building. The other defendant, Whitcomb, was a general contractor doing work at McCarthy's store on the day of the accident, and his men were at work on the building on that day. The material facts shown by the plaintiff's evidence are stated in the opinion.

At the close of the plaintiff's evidence, the defendant McCarthy rested, and asked the judge to rule that upon all the evidence the plaintiff could not recover against him and to order a verdict for him. This the judge refused to do, and submitted the case to the jury against both defendants. The jury returned a verdict for the plaintiff against both defendants in the sum of $1,000; and the defendant McCarthy alleged exceptions, the plaintiff having by leave of court discontinued his action as against the defendant Whitcomb.

M. O. Garner, for the defendant McCarthy.

G. W. Buck, (*E. D. Sherburne* with him,) for the plaintiff.

RUGG, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while coming out of the retail lace store of the defendant McCarthy, at the corner of West and Tremont Streets in Boston. These exceptions relate

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only to the liability of McCarthy, who will hereafter be referred to as the defendant. The accident occurred on the morning of September 19, 1904, which was a pleasant day. For some time before this a general contractor had been at work making changes and alterations in the store. This work was still in progress on the day of the injury. The plaintiff had often transacted business at the store, and when she reached it on the day in question she saw that scaffolding was built across the front, that the old entrance had been closed, and that a new entrance had been constructed, which consisted of a narrow passageway, somewhat darkened by the overhead scaffold, leading into the store from the sidewalk. The door, which was half the ordinary size, was open, and it was necessary to ascend two steps before reaching it. There were other indications of repairs and alterations in progress. The plaintiff testified that as she went into the store she noticed mortar or plaster upon the steps, some of which was dry and powdery, as though it had been trampled on and spread around, and some in lumps, and she had to pick her way into the store. As she came out of the store, after having remained there about five minutes, she slipped, but did not know whether she stepped upon the powdery substance or upon a lump. There was other evidence that the steps were covered with a substance that looked like mortar, "which had been dropped in a splash and gradually dried; part of it had been walked on; part of it had been dried and was broken off and had been scattered over the steps; there were bunches or collections of mortar there and also powdered mortar in considerable quantities; some of the bunches were attached to the step, and some loose rolling about under foot . . . some of the mortar or plaster had been tracked into the store, upon the floor near the door," and also that some of the substance had been tracked upon the sidewalk.

The question as to the plaintiff's due care, although close, was properly submitted to the jury. Albeit she observed the presence upon the steps of the powdered and lumped mortar before she entered, and had to pick her way along and feared that she might slip, the door was open leading into the store and business was in fact being conducted there as usual. An invitation on the part of the defendant was thus held out to customers to

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enter his store, which to some extent carried an implication of safety, if the invitation was accepted. The principle is too well settled to require a citation of authorities to support it, that mere knowledge of the danger of doing a certain act without a full appreciation of the risk involved is not sufficient to preclude a plaintiff from recovery, even though there may be added to the knowledge of danger a comprehension of some risk. It is still in most cases a question of fact whether, taking into account all the circumstances, including the knowledge and appreciation as well as every other material condition, the plaintiff is guilty of such negligence as to preclude recovery. Such knowledge and appreciation no doubt oftentimes, perhaps generally, constitute weighty evidence of negligence. They do not invariably rise to such clear and conclusive manifestation of want of ordinary prudence as to warrant a court in ruling as matter of law that there is want of due care. Facts are often present which require the court to say as a matter of law that no person of ordinary prudence would do the act which accompanied the injury. Although the terms "knowledge of danger" and "appreciation of risk" are frequently used in discussion of due care, still these elements in and of themselves do not constitute negligence, as matter of law. These expressions are valuable aids in describing what may be found as matter of fact to constitute negligence. They aptly define what is evidence of negligence, but do not state that which is always such conclusive and indubitable want of care as to constitute negligence as matter of law. The established standard is whether, taking everything into account, the act is one which the common sense of mankind pronounces want of such prudence as the ordinarily careful person would use in a like situation. It is hard to conceive of anything more universally known to be plainly liable to cause a person to slip than ice, yet it has not infrequently been held that knowledge of the presence of ice on the part of one attempting to pass over it, sometimes even when there is another way open, is not such evidence of negligence as to warrant the court in ruling as a matter of law that the person injured by the attempt to get over the slippery place is precluded from recovery by negligence. *Dewire* v. *Bailey*, 131 Mass. 169. *Dipper* v. *Milford*, 167 Mass. 555. *Foster* v. *Old Colony Street Railway*, 182 Mass.

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378. *Fleck* v. *Union Railway*, 134 Mass. 480. *Gilbert* v. *Boston*, 139 Mass. 313. *Mahoney* v. *Dore*, 155 Mass. 513. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. *Urquhart* v. *Smith & Anthony Co.* 192 Mass. 257. The instructions upon this branch of the case were accurate and sufficiently amplified to enable the jury to pass intelligently upon the facts in evidence. It seems plain that no court would be justified in ruling as matter of law that observation of loose pieces of mortar and powdered plaster rendered a walk so obviously dangerous as to stamp the act of attempting to pass over it as one that no reasonable person would undertake. *Mosheuvel* v. *District of Columbia*, 191 U. S. 247.

The case is also close on the negligence of the defendant. The material upon the steps does not appear to have been great in quantity or obviously of imminent danger in its character, yet considering all the circumstances, the smoothness of the step, which was of cement and glass set in an iron framework, the lumpiness of some of the mortar, and the fact that the place was evidently prepared as an entrance to a store where business was being conducted as usual notwithstanding the reconstruction of the front of the building, we cannot say as matter of law that this question was not for the jury. It is strongly argued that there is nothing to show that the condition complained of had existed for such a length of time as to charge the defendant with liability. But there was some evidence tending to show that the mortar splashed upon the step and had dried and had been trodden into the store and upon the sidewalk by the feet of persons passing through it. These considerations, coupled with the fact that the defendant must have known that the repairs were in progress, and had for that reason provided a temporary entrance to his store for customers, were enough to warrant a finding that the situation had existed under such circumstances and for such a period of time that in the exercise of reasonable care for the safety of his patrons he ought to have known about it and was thus charged with responsibility. The due care of a storekeeper upon one of the principal streets of a large city as to the access to his premises fairly may be found by a jury to require a considerable degree of inspection and supervision.

Exceptions overruled.

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DENNIS J. CALLAGHAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 13, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence.

If a cripple about sixty years of age, who walks with a crutch very slowly, while on his way home on a bright clear evening and about to cross a well lighted and unobstructed street, sees, before leaving the sidewalk, a lighted electric car approaching from a considerable distance at the rate of from six to nine miles an hour, and thereupon, thinking that he has time to cross, without looking again toward the car and without heeding a loud warning cry from a person attempting to rescue him, walks in front of the car and is struck and injured, he is not in the exercise of due care.

TORT for personal injuries sustained by the plaintiff from being struck by a car of the defendant while walking across Sixth Street in that part of Boston called South Boston at about ten o'clock on the evening of September 25, 1905, as described in the opinion. Writ dated December 16, 1905.

At the trial in the Superior Court before *Schofield*, J., the evidence disclosed the facts which are stated in the opinion.

At the close of the evidence, the defendant asked the judge to order a verdict for the defendant, but the judge submitted the case to the jury, in pursuance of an agreement by counsel on both sides, under instructions to which no exception was taken. The jury returned a verdict for the plaintiff in the sum of $1,950. Upon motion of the defendant this verdict was set aside on the ground that the plaintiff, as a matter of law, was not in the exercise of reasonable care, in that the evidence required a finding of fact that, after he first saw the car and started to cross the street, he took no further precautions for his own safety. In pursuance of a stipulation made at the trial, as a part of the agreement of counsel above mentioned, the judge reported the case for determination by this court. If the ruling of the judge was right, judgment was to be entered for the defendant. If the ruling was erroneous, judgment was to be entered for the plaintiff for the amount of the verdict, with interest from its date.

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W. J. O'Donnell, for the plaintiff.

S. H. E. Freund, for the defendant.

KNOWLTON, C. J. The only question in this case is whether there was evidence that the plaintiff was in the exercise of due care. He was a man of about sixty years of age who, by reason of a spinal disease, had been a cripple all his life, and walked slowly with a crutch. The accident happened at the corner of C Street and Sixth Street in South Boston, which streets cross each other at right angles, C Street running nearly north and south and Sixth Street running nearly east and west. Sixth Street is fifty feet and four inches wide between the outer lines on each side, and thirty-four feet wide from curb to curb. There is a single line of railway tracks in each street. The accident happened on September 25, at about ten o'clock in the evening of a bright, clear night, at a place which was well lighted by electricity. The plaintiff was about to cross on the easterly side of C Street over Sixth Street towards the south. There was no team or vehicle of any kind in the vicinity except the car that struck him, and the street was straight, and free from obstructions between him and the car all the time that he was there before the accident. According to his own testimony, when he was about to leave the sidewalk on the northerly side of Sixth Street he looked up the street and saw a lighted car a considerable distance away, and he thought he had time to cross. According to the testimony the car was coming pretty fast, but the highest estimate of its speed given by any of the witnesses was nine miles an hour. Others estimated it at about six miles an hour. He started to cross the street, walking very slowly with his crutch, and according to his testimony he did not look again or pay any attention to the approaching car before it struck him. He lived on the southerly side of Sixth Street, just westerly of C Street, and the testimony of his witnesses shows that, after leaving the sidewalk to cross over, he turned away from the cross walk and started to go diagonally towards his house. One of his witnesses who stood on the southerly side of Sixth Street testified that when the plaintiff got within four or five feet of the track the witness saw that he was in danger of being struck, and called out to him, "Hi, hi!", in a loud tone, and started to run to his assistance; that when he

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reached him the car had just struck him; that he "just got a hold of him by the arm and pulled him as the car struck him." Another witness, called by the plaintiff, who was standing near this witness, testified to substantially the same facts. Although both the witnesses said that the warning was given in a loud tone, the plaintiff paid no attention to it. It was undisputed that there was no other noise except that of the approaching car.

The plaintiff's crippled condition called for peculiar care in crossing before an approaching car. The undisputed evidence indicates that he took no care from the time when he saw the car from the sidewalk until after the accident. The language of the opinion in *Holian* v. *Boston Elevated Railway*, 194 Mass. 74, is peculiarly applicable to the evidence in this case, and the decisions in *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562, *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242, *Madden* v. *Boston Elevated Railway*, 194 Mass. 491, *Casey* v. *Boston Elevated Railway*, 197 Mass. 440, and *Byrne* v. *Boston Elevated Railway*, 198 Mass. 444, justify the presiding judge in setting aside the verdict for the plaintiff.

Judgment for the defendant.

FRANK D. MOFFAT & another *vs.* HUGH DAVITT & others.

Suffolk. November 18, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Performance and breach. *Pleading, Civil*, Declaration. *Practice, Civil*, Exceptions. *Evidence*, Relevancy. *Damages*, In contract.

In an action for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, an averment, that the defendant refused to receive the pig iron or any part thereof and to pay therefor as provided in the contract, is a good allegation of a breach of the contract.

In an action against the proprietor of a foundry for breach of an agreement to buy and pay for five hundred tons of pig iron, it appeared that about eight and a half months after the contract was made the former proprietor of the foundry, who originally had been joined as a defendant, sold the foundry and all the business connected with it to the later proprietor who owned it at the time of the trial. During the trial the plaintiff, by leave of court, discontinued his

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action against the former proprietor and amended his declaration by alleging the transfer and declaring against the later proprietor alone. Before the amendment, the presiding judge, against the objection and exception of the defendant, had admitted *de bene* evidence of correspondence between the plaintiff and the former proprietor of the foundry before the time of the transfer, but, at the close of the evidence, the judge, at the defendant's request, excluded from the consideration of the jury all correspondence previous to the date of the transfer. *Held*, that, although, after the discontinuance of the action as against the former proprietor and the amendment of the declaration, the evidence became incompetent against the remaining defendant, yet, the jury having been instructed to disregard it, the exception taken at the time of its admission could not be insisted on, as the defendant failed to show that he had been prejudiced.

In an action against the proprietor of a foundry for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, where the plaintiff contends that the defendant repudiated the contract, the plaintiff, for the purpose of showing such repudiation, may show that the defendant delayed the payment of debts in general pertaining to the business outside the plaintiff's contract and that the enterprise had turned out to be unprofitable and the defendant was contemplating an early sale of the plant, while constantly delaying, if not refusing, to receive any part of the five hundred tons of iron ordered from the plaintiff, the market price of which had diminished since the contract was made; and from such evidence the jury can find that the defendant was trying to get out of a bad bargain and had decided not to perform his contract with the plaintiff, and, if the plaintiff has shown that he was ready and willing and offered to perform his part of the contract, they may return a verdict in his favor.

In an action against the proprietor of a foundry for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, if the plaintiff shows that the defendant repudiated the contract and wholly refused to receive or pay for any of the iron, the measure of the plaintiff's damages is the difference between the contract price for the whole of the five hundred tons of iron and its market price, which can be shown by the price at which the iron was sold by the plaintiff to other persons in consequence of the defendant's repudiation of his contract.

CONTRACT against Hugh Davitt and Donald J. Davitt, formerly copartners doing business under the name of Hugh Davitt, and Mary F. Davitt, doing business under the name of the Davitt Iron Foundry, for alleged breach of a contract in writing in failing to accept and pay for certain pig iron. Writ dated November 19, 1903.

The declaration was amended during the trial by an amendment filed and allowed on June 14, 1906.

The amended declaration was as follows:

"And the plaintiffs say that on or about July 25, 1902, they made a contract with one Hugh Davitt, a copy of which is

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annexed to their declaration and marked 'A' and made a part hereof; that at the time of the making of said contract said Hugh Davitt was the owner of a foundry at Springfield, Mass.; that subsequent thereto, to wit, on or about May 9, 1903, said Hugh Davitt sold and conveyed said foundry and the property and business therewith connected to the defendant, Mary F. Davitt; that in connection with the purchase of said business said defendant assumed all contracts connected therewith including said contract marked 'A'; that subsequent thereto and until the bringing of this suit said business has been carried on by the said Mary F. Davitt under the name and style of the Davitt Iron Foundry; that on or about July 9, 1903, at which time no delivery had been made under and by virtue of said contract marked 'A,' a modification in writing of said contract marked 'A,' was made between plaintiffs and defendant, a copy of which is annexed to said declaration marked 'B' and made a part hereof; that the defendant became obligated to the plaintiffs to keep and perform all the terms of said contract and the modification thereof; that the plaintiffs have kept and performed all the terms of said contract and said modification thereof upon their part to be performed and have ever been ready, able and willing and have repeatedly offered to complete, keep and perform all the terms of said contract and said modification thereof upon their part to be performed; that the said defendant has neglected and refused, though often requested, to keep and perform the terms of said contract and said modification thereof on her part to be performed and neglected and refused, though often requested, to receive the pig iron or any part thereof and pay therefor as provided in said contract and said modification thereof and still neglects and refuses so to do."

The copies "A" and "B" referred to in the amended declaration were as follows:

"A"

"No. 313. Springfield, Mass., July 23, 1902.

"Have this day bought of F. D. Moffat & Co., five hundred tons of pig iron at twenty-three & 75/100 dollars per ton of 2240 lbs. Grade to be No. 2 X Saxton.

"Delivered at Furnace.

"Shipment to Springfield, Mass.

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"100 tons each Mo., Jan., Feb., Mar., Apr., May.

"Strikes, unavoidable delays and accidents at the furnace excepted.

"Terms cash 30 days, from arrival.

"Hugh Davitt."

"B"

"Springfield, Mass., July 9, 1903.

"It is hereby understood and agreed to that the 500 ton contract we now have with Frank D. Moffat & Company for No. 2 X Saxton pig iron at 23.75 furnace that we pay cash in 30 days from arrival of each car with understanding the price is to be reduced to 21.75 f. o. b. furnace, same being a reduction of $2.00 per ton.

"The Davitt Iron Foundry,

"D. J. Davitt, Mgr."

"Accepted:

"Frank D. Moffat & Co.

"7-9-03. A. Fred Hammett, Mgr."

In the Superior Court the case was tried before *Stevens*, J. The plaintiffs were dealers in pig iron, with offices in New York and Boston, and had been selling pig iron to Hugh Davitt, who had an iron foundry in Springfield, Massachusetts, for some years previous to 1902. The defendant, Mary F. Davitt, purchased the iron foundry business from Hugh Davitt on May 9, 1903, and afterward conducted the business through her husband, Donald J. Davitt, as manager.

At the close of the plaintiffs' case, they discontinued the action against Hugh Davitt and Donald J. Davitt and amended their declaration, as stated above, making Mary F. Davitt the sole defendant. The defendant Mary F. Davitt demurred to the amended declaration. The judge overruled the demurrer, and the defendant filed an answer to the amended declaration containing a general denial. The defendant excepted to the overruling of her demurrer, alleging that it was overruled without giving her a hearing upon it.

Saxton pig iron was manufactured exclusively by the Saxton Furnace Company at Saxton, Pennsylvania. "2 X" Saxton pig iron indicates the grade or quality, and the kind indicated

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contains a certain amount of silicon, — silicon being necessary in most castings and other iron foundry work.

The plaintiffs offered in evidence some correspondence between themselves and Hugh Davitt previous to May 9, 1903. The defendant Mary F. Davitt objected to the admission of all such evidence at the time it was offered, and the judge admitted it *de bene*. At the close of all the evidence the defendant asked the judge to strike out this evidence, whereupon the judge excluded all the correspondence previous to May 9, 1903.

At the close of the evidence, the defendant asked the judge to rule that upon the pleadings and the evidence the plaintiffs could not recover. The judge refused to make this ruling, and submitted the case to the jury. After having been out several hours, the jury returned for further instructions, whereupon the judge further instructed them as follows:

"I am asked, 'Can the jury consistently find damages for less than five hundred tons?' This case was tried upon the issue of whether or not the contract was repudiated. If it was repudiated by the defendant, then the plaintiff would be entitled to damages for five hundred tons. Of course if the contract was not repudiated, the plaintiff would not be entitled to any damages at all."

The jury returned a verdict for the plaintiff in the sum of $4,472.37; and the defendant alleged exceptions to certain admissions of evidence and refusals to exclude evidence, to the overruling of her demurrer without hearing the defendant, to the refusal to rule that upon the pleadings and the evidence the plaintiffs could not recover, and to the foregoing supplemental instruction to the jury in response to the jury's request.

C. Reno, for the defendant Mary F. Davitt.

H. L. Boutwell, (*W. H. Hastings* with him,) for the plaintiffs.

BRALEY, J. The amended declaration having aptly set forth the contract and alleged as a breach the defendant's unqualified refusal to accept and pay for the pig iron, a case was stated which if proved would entitle the plaintiffs to recover damages. *Speirs* v. *Union Drop Forge Co.* 180 Mass. 87. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 181 Mass. 275. *Clark* v. *Gulesian*, 197 Mass. 492. *R. H. White Co.* v. *Remick*, 198 Mass. 41.

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If evidence of the business dealings between the plaintiffs and the former owner of the foundry, who originally had been joined as a party, was competent until the amendment discontinuing the action as to him and the amended declaration had been allowed, it then became inadmissible against the defendant. But at the close of all the evidence, this testimony having been excluded on the defendant's motion and the jury fully instructed to disregard it, the exception previously taken to its admission is no longer open, as the defendant fails to show that she has been prejudiced.

The defendant became the owner of the foundry under an agreement to assume and pay the outstanding merchandise indebtedness of the vendor, which included bills due or to become due to the plaintiffs for iron already delivered or to be furnished in the future. The plaintiffs do not contend that evidence of the defendant's failure to pay this indebtedness according to the terms of the sale had any connection with the contract, for the breach of which the present action was brought, but they contend that it was admissible on the issue of repudiation. Upon this question much evidence, including numerous letters between the parties, was introduced. If repudiation of the contract by one of the contracting parties may be shown by proof of an unqualified refusal of performance directly made to the other party, it also may be shown by proof of such conduct on his part as to leave no other reasonable inference. After the defendant purchased and carried on the foundry, proof of her delay in meeting payments of debts connected with the business, as well as the letters of her manager, from which it could have been inferred that the enterprise had turned out to be unprofitable and that she was contemplating an early sale of the plant, while constantly delaying if not refusing to accept delivery of any part of the five hundred tons of iron, the market price of which had decreased, furnished evidence from which the jury would be warranted in finding that she finally had decided not to perform, and was seeking to get out of a bad bargain. *Earnshaw* v. *Whittemore*, 194 Mass. 187. The offer of performance tendered by her counsel in reply to the plaintiffs' demand for a settlement did not weaken the probative force of this testimony, for it easily could have been found to have been a possible

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makeshift, intended only to postpone a lawsuit. There having been no dispute that the plaintiffs not only were ready and willing to perform but tendered performance, it consequently follows that the defendant's request for a ruling, that upon the pleadings and the evidence the plaintiffs could not recover, was refused rightly. *Morton* v. *Clark*, 184 Mass. 555, 557.

Nor is the exception to the supplemental instruction on the measure of damages well taken. If the contract was found to have been wholly repudiated, then, whether after it had been made there was a subsequent oral agreement for the delivery of the iron as it might be needed from time to time, or this was to be implied from the terms "that we pay cash in thirty days from arrival of each car" when read in the light of the attendant circumstances, as claimed by the defendant, or whether delivery was to be within a reasonable time under the construction claimed by the plaintiffs, became an immaterial question. Whichever construction was adopted, the contract was entire, even if payments were to be made by instalments, and, as no part of the purchase had ever been delivered, the measure of damages was correctly stated to be the difference between the market price of the entire amount at the time of repudiation and the price at which the iron had been sold. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474. *McLean* v. *Richardson*, 127 Mass. 339. *Parker* v. *Russell*, 133 Mass. 74, 75. *Speirs* v. *Union Drop Forge Co.* 180 Mass. 87. *Earnshaw* v. *Whittemore*, 194 Mass. 187.

Exceptions overruled.

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PHILIP S. DEANE & another *vs.* AMERICAN GLUE COMPANY.

Suffolk. November 16, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Agency, Existence of relation, Scope of authority or employment, Undisclosed. *Evidence*, Admissions and confessions. *Practice, Civil*, Exceptions. *Conversion*. *Set-off*.

Where one, who is engaged in business as an "electrical contractor" and who never has dealt in glue, at the suggestion of a glue broker and jobber enters into an arrangement whereby the broker is permitted to use the name and credit of the "electrical contractor" in the purchase and resale of glue to be invoiced and billed in the name of the "electrical contractor," who is to receive therefor a commission of two and one half per cent, and the broker, with the knowledge and consent of the "electrical contractor," fixes the price at which the glue shall be sold, makes sales and collects the proceeds from the purchasers, the broker must be deemed to be the agent of the "electrical contractor" in the transactions as to glue.

The mere fact that one writes a letter upon the letter paper and under the letterhead of a corporation is no evidence that while so doing he is acting as an agent of the corporation.

The mere fact that a person wrote a letter upon the letter paper and under the printed letterhead of a corporation does not make statements contained in the letter admissible as admissions binding upon the corporation in the absence of further evidence showing that the person who wrote the letter was an agent of the corporation with authority to make such admissions.

Where a bill of exceptions states an exception to the exclusion of a letter offered as evidence, but does not set forth either the letter or a description of its contents or the purpose for which it was offered, the exception cannot be sustained since there is nothing in the record to show that the excepting party was harmed by the exclusion of the evidence.

At the trial before a judge without a jury of an action of tort for the conversion of a certain lot of glue, it appeared that the plaintiff, an "electrical contractor" who never had dealt in glue, made an arrangement with one who was a glue broker and jobber whereby the latter was permitted to use the plaintiff's name and credit in the purchase and resale of glue to be invoiced and billed in the plaintiff's name, and the plaintiff was to receive therefor a commission of two and one half per cent. Upon receipt of the invoice and bill of lading of the glue in question, the plaintiff indorsed it to the defendant and delivered it to the broker for delivery to the defendant, and there was evidence tending to show that the plaintiff also at the same time sent to the defendant a bill for the glue. Evidence of the defendant tended to show that the bill of lading which he received was in the name of the broker and nowhere contained the name of the plaintiff, and that the defendant never received any bill from the plaintiff and did not know that the plaintiff was interested in the transaction. The plaintiff contended that the broker procured the glue from him by fraud, and that therefore

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the defendant had no title to it. The judge found generally for the defendant and the plaintiff alleged exceptions. *Held*, that the exceptions must be overruled, since the judge must have found that, in making the sale to the defendant, the broker acted as agent for the plaintiff within the scope of his authority, and therefore title to the glue passed to the defendant.

Where, acting on behalf of another, a glue broker and jobber sold glue to one, who did not know and had no reason to know that the broker and jobber was acting otherwise than on his own behalf and to whom the broker and jobber was indebted in a sum larger than the purchase price of the glue, the broker's principal cannot recover the price of the glue from the purchaser, since he is subject to the equities in the purchaser's favor which existed between the purchaser and the broker and jobber, and the purchaser has a right to set off the broker's debt to him.

CONTRACT OR TORT. Writ in the Superior Court for the county of Suffolk dated September 19, 1907.

The first count in the declaration was on an account annexed containing charges for various quantities of glue, and, accompanying each such charge, an item, "2½ % for buying."

The second count, "for the same cause of action as count one," alleged that the arrangement described in the first paragraph of the opinion was made by the plaintiffs with the defendant through its agent, one Cummings, and that the plaintiffs sought recovery according to the account annexed to the first count.

The third count was for interest.

The fourth count was in tort, and alleged that the defendant converted to its own use certain lots of glue described in the previous counts, the property of the plaintiffs. Subsequent counts in tort alleged separately the conversion of each of such lots of glue.

The case was tried in the Superior Court before *Aiken*, C. J., without a jury. Besides the facts stated in the opinion, the evidence introduced by the plaintiffs tended to show that certain qualities of glue could not be purchased by the defendant directly from the manufacturers, since manufacturers sold only to consumers of glue and the defendant was a dealer in glue; that Cummings, a glue broker and jobber, induced the plaintiffs, who were electrical contractors, to allow him to use their firm name for the purchase of glue to be resold by them to the defendant; that the plaintiffs were to sell only to the defendant; that Cummings procured the lots of glue which were the basis of the action from the manufacturers and they were invoiced to

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the plaintiffs; that the plaintiffs then, at the request of Cummings, indorsed the bills of lading to the defendant and delivered them to Cummings, at the same time mailing to the defendant a bill for glue, a duplicate of which was given to Cummings; that such lots of glue were received by the defendant on March 15, 18, April 27, May 1, and 8, 1907, the plaintiffs' instructions to Cummings being that they should be sold on sixty days' time; that on May 11, 1907, Cummings delivered to the plaintiffs a check of the defendant payable to him and by him indorsed to them, the amount of which exactly corresponded to the price of the first two lots of glue, and that no other payment for any of the glue was made to them excepting a payment on June 22, 1907, which was made after a controversy had arisen between the plaintiffs and the defendant, and was for the last lot of glue received by the defendant on May 8, 1907, for which it admitted it had received a bill from the plaintiffs at the time of delivery. In the direct examination of the plaintiff Deane, the presiding judge asked him, "Now, the question is, who made the collections?", to which he made answer "George W. Cummings."

The defendant's evidence tended to show that no bill had been received by it from the plaintiffs for any of the glue excepting the last lot, that the invoices which it received were in the name of Cummings himself, that none of its officers or agents had any knowledge or means of knowing that Cummings was acting for the plaintiffs in the transaction, that other checks had been given by it to Cummings on March 18 and May 7, and, further, that Cummings was indebted to it in a sum greater than that which the plaintiffs sought to recover.

At the close of the evidence the plaintiffs requested the judge to rule as follows:

1. On all the evidence the plaintiffs are entitled to recover.

2. The title to the property alleged to have been converted never passed to the American Glue Company, but remained in the plaintiffs if they were induced to part with the bills of lading by the fraudulent representations of Cummings.

3. The acts of Cummings in making the alleged sales of the property to the American Glue Company gave that company no rights in the property against the plaintiff.

4. The acts of the American Glue Company in receiving

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the property from the railroads and selling it were acts of conversion.

5. No demand by the plaintiffs on the defendant was necessary in this case before bringing action.

6. If the plaintiffs in fact honestly and in good faith dealt with Cummings and regarded him as the agent or employee of the defendant, the facts in the case show that the plaintiffs were justified in giving credit to the defendant, and the latter are liable for all the goods sold.

The judge refused so to rule, and found generally for the defendant. The plaintiffs alleged exceptions.

W. F. Prime, for the plaintiffs.

B. L. M. Tower, (*S. H. Pillsbury* with him,) for the defendant.

BRALEY, J. It was undisputed that the plaintiffs were copartners doing business as "electrical contractors," but never had dealt in glue until, at his suggestion, they entered into an arrangement or contract with one Cummings, who was a glue broker and jobber, whereby they permitted him to use their name and credit in the purchase and resale of glue to be invoiced and billed in their names, in consideration that on all sales they were to receive a commission of two and one half per cent. In acting for them, it further appears, that with their knowledge and assent he fixed the price for which glue should be sold, made sales and collected the proceeds. Having been clothed with this authority, he must be deemed the agent of the plaintiffs.

The averment in the second count of the declaration, that Cummings acted as the agent of the defendant, is wholly unsupported by any evidence, for the letter alleged to have been written by him on paper bearing the defendant's letterhead, unless connected with the company, was not evidence which would support a finding that he was acting for it. It is familiar law, that unless some proof of agency is offered, the mere declarations of one who assumes to be an agent cannot be admitted to bind his alleged principal. A foundation must first be laid from which such a relation can be inferred, and from whom he procured the letterhead is not shown.

The admission of the letterhead, and of the fact that the letter paper of the defendant was used, at least was sufficiently favorable to the plaintiffs. The plaintiffs do not show that they are

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aggrieved by the ruling excluding its contents, as neither the text of the letter nor the purpose for which it was offered is stated. *Baker* v. *Gerrish*, 14 Allen, 201. *Phenix Nerve Beverage Co.* v. *Dennis & Lovejoy Wharf & Warehouse Co.* 189 Mass. 82. *Magnolia Metal Co.* v. *Gale*, 191 Mass. 487.

The agent, having been clothed with these powers, entered into negotiations with the defendant for the sale of the parcels or invoices of glue described in the several items of the account annexed, of which only the proceeds of the sales under the tenth and thirteenth items were finally in issue at the close of the evidence. If there was testimony which would justify a finding, that at the time of purchase, without information or knowledge of his agency, the defendant dealt with Cummings, the title legally passed, and it is not liable to the plaintiffs either in tort for its conversion or in contract for the price, except so far as the proceeds, if at all, may have exceeded any liability of their agent to the company.

In making the sales in suit, the agent, although he did not disclose his agency, did not act in excess of the scope of his employment. If, for their own protection and under the arrangement with him, the invoices ran in the plaintiffs' firm name and ordinarily would have to be properly indorsed by them before the railroad company would deliver, yet, the sale having been effected by their representative, there was no conversion by the defendant, and no question of the election of remedies or of ratification, where there has been an unauthorized sale of the owner's property to a third person, is presented. *Metcalf* v. *Williams*, 144 Mass. 452.

The plaintiffs testified that they never purchased any glue except for the purpose of reselling it to the defendant, and there seems to have been no doubt, as stated by the judge and admitted by its counsel, that the plaintiffs believed they were selling the glue in suit directly to the company when they indorsed to the company's order the bills of lading or invoices and gave them to Cummings, after he reported that the sale had been negotiated. It would seem to be plain that, according to the common course of business, the carrier would not have delivered the glue to the defendant under this indorsement without its order. By what means he either used or suppressed

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these invoices, and invoiced the merchandise in his own name to the company, as testified by its general manager, is not stated. If the testimony of the plaintiffs and the general manager, who was called as a witness by them, is believed, that the invoices must have been manipulated in some way, is evident.

But, even if it would have been possible to find that at the time of sale duplicates of some of the invoices of the sales in suit, properly addressed and mailed, had previously been received, or that, from the conversation which the plaintiffs testified to having had with the general manager the defendant was put upon its inquiry and might have been charged with knowledge that the plaintiffs were the principals,* these matters were purely questions of fact. The credibility of the witnesses also was solely for the trial court. In view of the form which the transaction finally assumed, and the uncontradicted testimony of the general manager, that Cummings invoiced all goods in his own name to the company, and brought to him the bills of lading, we cannot say as matter of law that the general finding in favor of the defendant, which of course must have rested upon a finding that it did not know or have any reasonable cause to apprehend that the plaintiffs were the principals, was unwarranted.

If, while sustaining the relation of agent to the plaintiffs, he made the sales for value to the defendant, who dealt with him without knowledge of his agency, then the plaintiffs, as undisclosed principals seeking to avail themselves of the benefit of the contract, are subject to any equities in its favor which existed between the company and Cummings. *Cushman* v. *Snow*, 186 Mass. 169, 174, and cases cited. The defendant, therefore, had a right to apply in set-off the amount of the sales

* The plaintiff Deane testified as to this conversation, which he stated occurred early in June, 1907, as follows: "We went down to his office and told him who we were, and he granted us an interview and told us that he did not — showed us this other bill, this last bill, and said he would pay for that, and the others he claimed to have paid Mr. Cummings for, and said that he had paid them, and in the course of the conversation he admitted having received bills from us, but he had turned them over to Mr. Cummings because Mr. Cummings told him they were paid, we had no business to bill that way; as I understand, he had turned them over to Mr. Cummings his say-so, 'That is all right; those have been paid; I have paid them since they were mailed,' or, 'They shouldn't have mailed to you.'"

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against his indebtedness, and, when this had been done, no balance remained. The first request, that on all the evidence the plaintiffs were entitled to recover was properly refused, and the other requests became immaterial under the general finding, to which, for reasons stated, the plaintiffs' exception cannot be sustained. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89.

Exceptions overruled.

JESSIE M. THORNTON *vs.* FRANKLIN SQUARE HOUSE.

Suffolk. November 17, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Charity. Negligence.

A corporation, organized under Pub. Sts. c. 115, without capital stock or stockholders, for the purpose of providing a home for working girls at moderate cost, which conducts such a home for working girls, furnishing board and lodging at cost and free medical attendance as well as the use of a library and, in the winter months, weekly entertainments and lectures without charge, whose officers serve without pecuniary compensation, and whose necessary disbursements required to maintain the institution cannot be met in full except by donations from those interested in its welfare, and are so met, is as matter of law a charitable corporation.

A charitable corporation is not liable for injuries caused by the negligence of its servants or agents properly selected.

TORT against the Franklin Square House, a corporation organized under Pub. Sts. c. 115, for personal injuries sustained by the plaintiff on February 9, 1904, by reason of the falling of a fire escape attached to the defendant's building, the plaintiff, who was lodging and boarding with the defendant for hire, having resorted to the fire escape when a part of the building was on fire. Writ dated November 5, 1904.

At the trial in the Superior Court *Bond*, J., at the close of the evidence ordered a verdict for the defendant on the ground that it was a charitable corporation. The plaintiff alleged exceptions.

G. R. Swasey & E. M. Haynes, for the plaintiff.

E. K. Arnold, (*J. P. Russell* with him,) for the defendant.

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BRALEY, J. In *Franklin Square House* v. *Boston*, 188 Mass. 409, it was held that the defendant could be found to be a charitable corporation and as such exempt from taxation. The plaintiff in the present case puts her right of recovery upon the ground that the evidence now abundantly proves or the jury to whom the question should have been submitted could find that the defendant is not a charitable but a private corporation, and hence is liable to her in damages for the injury which she received. The defendant was incorporated under the provisions of Pub. Sts. c. 115, without either capital or stockholders, for the purpose expressed in its charter "of providing a home for working girls at moderate cost." In furtherance of this object the corporation was duly organized by the election of officers, who were to serve without pecuniary compensation, and by the adoption of by-laws, which defined their powers and duties. The fund to buy the equity of the real estate, the equipment of the hospital department, and the furnishings of the two large and eleven small parlors were the gifts of friends. The facts as to its humanitarian mission and the founding of the house, its financial resources and the scope of the defendant's management were all narrated by the clerk of the corporation, who was called as a witness by the plaintiff, and whose testimony remained uncontroverted. It is established for an indefinite class of the general public, who oftentimes, by reason of low wages or limited means, are unable to provide themselves with sufficient sustenance and clothing, and concurrently to secure the comforts with the educational and ethical environment of a home devoted solely to their welfare. In practical operation, as well as in design, working girls are afforded a homelike place in which to live, at prices for board, washing and lodging alone, as cheap, or cheaper, than they could be obtained by them under similar surroundings as to respectability and incentives to the proper conduct of life. A matron and resident nurse, whom the defendant pays for their services, are in constant attendance, while free medical attendance is furnished by physicians who serve on the hospital staff without pay. A library, with weekly entertainments, and lectures during the winter months also are provided. To found, equip, maintain and contribute a home of this description for working girls,

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where at an outlay within their means they can obtain for the bare cost shelter and maintenance, and also free of expense be provided with large opportunities for mental and moral improvement, and, if sick, with proper medical attendance, constitutes in law a public charity. *Massachusetts Society for the Prevention of Cruelty to Animals* v. *Boston*, 142 Mass. 24. *Sherman* v. *Congregational Home Missionary Society*, 176 Mass. 349. *Amory* v. *Attorney General*, 179 Mass. 89. *Minns* v. *Billings*, 183 Mass. 126. *Franklin Square House* v. *Boston*, 188 Mass. 409. *Farrigan* v. *Pevear*, 193 Mass. 147. If in any year the revenue derived from payments received from the inmates proves to be sufficient to pay for fuel, light, food, laundry and domestic service, these expenses form only a part of the necessary disbursements required to maintain the institution, which could not be met except by donations from those interested in its welfare. The primary purpose for the support of which the receipts from every source were appropriated remained unchanged, and there is an entire absence of the element of pecuniary gain in any form enuring to the benefit of the original corporators, or of their successors and associates. By receiving these payments, therefore, the essential character of the trust was not perverted, nor did it cease to be a charity and become a purely business enterprise conducted for private profit. *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. Rep. 294.

The plaintiff, while an inmate, was injured by the falling of a fire escape on the premises, but no evidence whatever appears as to the circumstances of the accident, or of any negligence of the defendant's servants or agents. If the injury was caused by the negligence of servants or agents properly selected, the defendant is not liable for their torts, for reasons discussed in the recent case of *Farrigan* v. *Pevear*, 193 Mass. 147, by which upon this question the present case must be governed. But, if regarded as arising from the neglect of those who administered or controlled the management of the trust, no testimony was offered to charge them with having failed in the performance of their duties. *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 436.

Exceptions overruled.

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HARRISON DUNHAM *vs.* CITY OF LOWELL.

Middlesex. November 17, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Assessment, Abatement.

Where the legal title to land is held by a trustee under a will, a tax thereon should be assessed to such trustee.

One, who purchased and received a conveyance of land after May 1, and thereupon applied to those, who had assessed a tax to the owner of the land on May 1, to abate the tax, is not a person aggrieved by the assessment and cannot appeal to the Superior Court under R. L. c. 12, § 78, from a refusal of the assessors to grant the abatement.

As between the authority assessing a tax to the owner of land and the person to whom the tax is assessed, such person and not the land is primarily liable, the lien on the land being merely security of which the collector of the tax may avail himself in case of a default on the part of the person assessed.

COMPLAINT, filed in the Superior Court for the county of Middlesex under R. L. c. 12, § 78, against the refusal of the assessors of taxes of the city of Lowell to abate a tax assessed on May 1, 1907, upon certain real estate.

At the trial in the Superior Court before *Bond*, J., it appeared that one Brown, who was the plaintiff in *Brown* v. *Wright*, 194 Mass. 540, held the real estate in question on May 1, 1907, as trustee under a will, that, after the issuing of the rescript in that case, a single justice of this court on May 21, 1907, entered a decree directing a sale of the land, which sale was consummated on July 19, 1907, the complainant being the purchaser. Brown had not applied for any abatement of the tax. The complainant applied for such abatement on October 7, 1907, but the assessors refused to recognize his application.

The presiding judge dismissed the complaint; and the complainant alleged exceptions.

H. Dunham, pro se.

J. G. Hill, for the respondent, was not called upon.

HAMMOND, J. 1. The tax was properly assessed to Brown. He held the legal title as trustee, at least so far as respected the question of taxation. *Brown* v. *Wright*, 194 Mass. 540. It was therefore a valid lien upon the land.

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2. The right to abatement is solely a creature of statute. R. L. c. 12, § 73, upon which the petitioner bases his right to apply for an abatement, provides that "a person aggrieved by the taxes assessed upon him" may make such application; and the question is whether within the meaning of the statute the petitioner is a person upon whom the tax was assessed. He was not the owner of the land on May 1, 1907, as of which time the tax was assessed, and the tax could not have been legally assessed to him. He contends, however, that it is primarily a charge upon the land, and that, inasmuch as he has since become the owner of the land, he is interested in the amount of the tax, which is excessive, and that in this way he is aggrieved by the assessment made as he says upon it; or, more briefly stated, the assessment for which the land may be held is an assessment upon him within the meaning of the statute.

The trouble with this contention is that, while in a certain sense and as between certain persons a tax may be regarded as primarily a charge upon the land, (*Swan* v. *Emerson*, 129 Mass. 289, 291,) yet it is not so as between the assessor or collector and the person assessed. As between them the tax is primarily a pecuniary imposition upon the latter, and the lien on the land is to be regarded simply as security of which the collector may avail himself in case of the default of the person assessed. Indeed there never is any lien upon real estate for taxes unless given by statute, (see the cases cited in Cooley on Taxation, 3d ed., 865, note 6,) and our earlier tax acts contained no provision for such a lien except possibly in the case of non-residents. See as examples St. 1780, c. 43; St. 1781, c. 16. A provision for such a lien as to real estate in Boston, however, appears in the tax act approved February 23, 1822, being St. 1821, c. 107, as found in 2 General Laws of Massachusetts, 577. It is stated in the note by the commissioners to this statute that this feature never had appeared before in a tax act. In the tax act of 1824 (St. 1823, c. 133) the principle was extended for the first time to all taxes on real estate throughout the Commonwealth, and ever since it has been one of the features of our tax system. *Hayden* v. *Foster*, 13 Pick. 492. St. 1830, c. 151, § 9. At first there does not seem to have been any limit of time expressly given to the existence of the lien, but by Rev. Sts. c. 8, § 18, the

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time with certain exceptions was reduced to two years. See *Hayden* v. *Foster*, *ubi supra*, for an instructive discussion upon this subject.

The tax, as we have said, was primarily upon the person assessed, and before the existence of the lien the only manner of collecting it was by demand, distress or arrest. The very earliest directions for collecting the tax in case it was not paid on demand were as follows: "The officer shall distrain goods or cattle if they may be had, and if no goods, then lands and houses; if neither goods nor lands can be had within the town where such distress is to be taken, then to attach the body." Anc. Chart. 71.

From a study of the history of our general method of taxation both as to remedies against the person assessed and as to the tax lien upon land, it clearly appears that as between the authority assessing the tax and the person assessed the latter is the person primarily liable, and that the assessment is made upon him as the landowner and not upon the land as such. Within the fair interpretation of the statute the subsequent landowner does not become upon his purchase the person assessed. The person assessed in this case was Mr. Brown and none other. The petitioner has no standing for an abatement. The case of *Hough* v. *North Adams*, 196 Mass. 290, upon which the petitioner somewhat relies, contains nothing inconsistent with this result.

Exceptions overruled.

CHARLES H. PICQUETT *vs.* WELLINGTON-WILD COAL COMPANY.

Suffolk. November 9, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, In use of highway. *Practice, Civil*, Judge's charge.

In an action against a coal company for personal injuries from falling down a coal hole in the sidewalk of a city street, which was negligently left open and unguarded by the servants of the defendant, there was evidence that the accident happened late in a snowy afternoon in the month of January, when it was very dark, that the plaintiff saw the defendant's coal team at the sidewalk and supposed that coal was being delivered from it into a coal hole, that he went into

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the street to go around the horses' heads, but, finding the street slushy, returned to the sidewalk, that he walked close to the side of the building and could not see any coal, that he saw something black on the sidewalk close to the rear of the team and a man poking a few pieces of coal left in the cart and thought that the delivery of the coal was finished and that the coal hole was closed, that, while thus going close to the building so that his shoulder was four or five inches from it, he fell into the coal hole, which was rectangular and measured twenty-two inches by thirty-four inches, whereas the ordinary coal hole is circular and is from twelve to fifteen inches in diameter. On cross-examination the plaintiff testified that he went around the team to avoid disaster, that "the disaster might have been a coal heap," and that he did not look to see whether any coal hole was there. *Held*, that there was evidence for the jury that the plaintiff was in the exercise of due care; that the fact that the plaintiff did not look for the coal hole might have been due to the darkness being so dense that looking would not have disclosed its situation, and that his statement, elicited on cross-examination, that he went into the street to avoid disaster, and then, on finding it slushy, returned to the sidewalk, did not as matter of law show knowledge of the danger and appreciation of its extent.

The provision of R. L. c. 173, § 80, that "the courts shall not charge juries with respect to matters of fact," does not make it improper for the presiding judge, in charging the jury in an action against a coal company for personal injuries from falling into a coal hole alleged to have been left open and unguarded by the servants of the defendant, upon the question whether a warning given to the plaintiff by the driver of the defendant's coal team, if given at all, was given too late, to use the illustration of a "scorcher" bicycle rider who said to a man just as he ran over him "Look out!" Whereupon the man said "For heaven's sake, are you coming back again?"

TORT for personal injuries from falling into a coal hole alleged to have been left open and unguarded by servants of the defendant. Writ dated September 9, 1904.

In the Superior Court the case was tried before *Harris*, J., who refused to order a verdict for the defendant and submitted the case to the jury. The evidence upon the issue, whether the plaintiff was in the exercise of due care at the time of the accident, is described in the opinion.

The portion of the judge's charge containing the illustration referred to in the opinion, to which the defendant excepted, was as follows:

"The plaintiff contends in answer to that, that even if there was a warning given by saying 'look out' it was the belated warning after the fall. To make an illustration, taking my illustration perhaps from authorities not usually brought into court, it is a question whether, if there was any warning given, it was a real warning before the plaintiff put himself in the place of danger, or whether it was the warning given by the

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'scorcher' bicycle rider to the man whom he ran over who said, 'Look out' to him just as he ran over him, and the man said, 'For heaven's sake, are you coming back again?' Well, that is not a usual authority but it illustrates the situation, whether it was a real warning or whether it was the involuntary exclamation that we are apt to make when we see a person in a place of danger and we think likely to be hurt. Now, that is a fair question of fact."

Before the charge, "the plaintiff's counsel had argued without objection on the defendant's part that if any warning was given, it was probably after the plaintiff had lifted his last foot in the air and was descending through the hole."

The jury returned a verdict for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

J. Lowell & J. A. Lowell, for the defendant.

E. F. McClennen, for the plaintiff.

RUGG, J. The plaintiff seeks in this action of tort to recover for personal injuries received by falling into a coal hole, while travelling on a public way in Boston. At about half-past five o'clock, on the afternoon of a snowy day in early January, the plaintiff was walking along Arch Street, when he saw the defendant's coal team at the sidewalk, and supposed that coal was being delivered from it into a coal hole. He went into the street to go around the horses' heads, but finding the street slushy, returned to the sidewalk. The plaintiff's testimony tended to show that the place was dark, that one could see an object, but could not tell a man's face, that he walked close to the side of the building, and could not see any coal, but saw something black on the sidewalk, close to the rear of the team and a man poking a few pieces of coal left in the cart, and while thus going close to the building so that his shoulder was four or five inches from it, he fell into the coal hole; and that this hole was rectangular, twenty-two inches by thirty-four inches, while the ordinary coal hole is circular in shape, and twelve to fifteen inches in diameter. The defendant strongly argues that there was no sufficient evidence to warrant a finding that the plaintiff was in the exercise of due care, basing this contention largely upon the plaintiff's statement in his cross-examination that he "went around the team to avoid disaster. The disaster might

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have been a coal heap. . . . He didn't look to see if any coal hole was there." Too much weight, however, cannot be attached to isolated expressions of a witness. His conduct as to due care must be determined in the light of all the circumstances of action and omission, and of the knowledge that he had or ought to have had at the time as well as of detached scraps of testimony, which the jury may regard as the result of too severe stress or strategic skill in cross-examination and weigh accordingly. The jury might have found upon this evidence that the sidewalk was a more convenient and reasonable place for pedestrians than the street, in the then existing weather, that the appearance of the sidewalk in connection with the cart in the dim light was such as to justify the inference, which the plaintiff testified he drew, that the delivery of the coal was finished, the lantern taken away and the coal hole closed, and that the plaintiff saw only the dark spot next the curbing and walked as near as he conveniently could to the building, where coal holes are not commonly found. These conditions, if found to exist, together with the fact that the opening was of different shape and of materially larger dimensions than the ordinary coal hole, and was not plainly visible nor seen by the plaintiff, are enough to sustain the finding that he was in the exercise of ordinary care. That he did not look for the coal hole may have been found to be due to the darkness being so dense that looking would not have disclosed it. His statement, that he went into the street to avoid disaster, and then, on finding it slushy, returned to the sidewalk, cannot be ruled as matter of law to have constituted knowledge of the danger and appreciation of its extent, but was rather a graphic way of stating his design in first leaving the sidewalk. In conjunction with his other testimony, it certainly did not fix him with knowledge of the existing danger. It was for the jury under all the circumstances to draw what inferences seemed reasonable to them, as men of experience in the common affairs of life, not only from what the plaintiff knew or could have known of the precise condition existing on the sidewalk, but also from his consciousness that the defendant in delivering coal owed a duty to those passing upon the sidewalk to see that the coal hole was properly guarded and protected so that pedestrians would not be liable to fall in. The case is well within recent

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decisions. *French* v. *Boston Coal Co.* 195 Mass. 334. *Owens* v. *Harvard Brewing Co.* 194 Mass. 498. *Wakefield* v. *Boston Coal Co.* 197 Mass. 527.

The defendant also complains of an illustration given by the judge, as being a charge upon the facts within the prohibition of R. L. c. 173, § 80. There was conflicting evidence as to whether the plaintiff had been warned of danger by the defendant's driver. One issue apparently was whether any warning, if given, was timely or too late. The illustration given is not open to objection. While it was picturesque and pointed, it was apposite to the evidence which the jury were to consider and to one of the questions which they must pass upon. It falls within the authority of the court in charging a jury, as stated at length in the cases of *Whitney* v. *Wellesley & Boston Street Railway*, 197 Mass. 495 and *Plummer* v. *Boston Elevated Railway*, 198 Mass. 499. These principles have been so recently and so fully discussed that it is not necessary now to amplify them further.

Exceptions overruled.

BENJAMIN F. WYETH *vs.* BOARD OF HEALTH OF THE CITY OF CAMBRIDGE.

Suffolk. November 20, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Undertaker. Burial. Mandamus. Board of Health. Registration in Embalming. Constitutional Law, Right to pursuit of happiness, Private rights, Delegation of legislative powers, Police power. *Practice, Civil*, Reservation by report.

The refusal of the board of health of a city to grant a license as an undertaker to one, who is shown to be qualified in other respects for the occupation, solely for the reason that he is not licensed as an embalmer is illegal, and, where it appears that the license, except for that reason, would have been granted, a peremptory writ of mandamus will be issued ordering the board of health to grant the license.

A rule made by the board of registration in embalming, assuming to act under authority of St. 1905, c. 478, § 6, that "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks or selectmen of a town, or any other persons authorized to issue burial permits, to any person or persons who have not been registered and received a certificate from the State board of registration in embalming," is without foundation in law or reason, is a violation of the right of every one under the Constitution of the Commonwealth

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to pursue any proper vocation to obtain a livelihood, and also is an unreasonable attempt to interfere with the private right to bury the body of a relative or friend, that is not allowable under the Constitution of the Commonwealth or the Constitution of the United States.

It seems, that, if St. 1905, c. 473, § 6, undertook to empower the board of registration in embalming to pass a rule that no boards of health or other persons authorized to issue burial permits should issue them to any person who has not registered and received a certificate from the board of registration in embalming, it would be held to be unconstitutional as assuming to delegate general legislative authority.

The power of the Legislature to exercise complete control of burials of the dead so far as is necessary for the protection of the public health and the promotion of the public safety is unquestioned, but, whether a statute directly forbidding the issuing of a burial license except to a person who has received a certificate as a registered embalmer could be upheld as such an exercise of the police power, may be doubted.

A report by a single justice to the full court of the questions of law arising upon a petition for a writ of mandamus addressed to the board of health of a city directing them to issue to the petitioner a license as an undertaker, which the respondents had refused to issue for the reason that the petitioner was not licensed as an embalmer, contained the following reservation: "If the refusal of the respondents to grant the petitioner a license as an undertaker solely for the reason that he is not licensed as an embalmer is unwarranted, improper, and illegal, a writ of mandamus is to issue; if it is legal and properly authorized under the law and constitution the petition is to be dismissed." *Held*, that by the terms of the report the question of discretion whether the writ should be granted must be taken to have been decided in favor of the petitioner, that the report was equivalent to a finding upon the answer and the agreed facts that the only reason for the respondents' refusal was that the petitioner was not licensed as an embalmer, and that, except for this, the respondents in the exercise of their judgment and discretion would have granted the license, and that, therefore, upon this court deciding that the reason given by the respondents for refusing the license was without foundation in law or reason, nothing remained to be done but to enter an order that a peremptory writ of mandamus should issue.

PETITION, filed on June 15, 1908, for a writ of mandamus addressed to the persons constituting the board of health of the city of Cambridge, commanding them to issue to the petitioner a license as an undertaker.

The case came on to be heard before *Knowlton*, C. J., who reserved it for determination by the full court in the following report: "After a hearing, and by agreement of parties, the questions of law arising upon the petition and answer and agreed statement of facts in this case are reported for the consideration of the full court. If the refusal of the respondents to grant the petitioner a license as an undertaker solely for the reason that he is not licensed as an embalmer is unwarranted,

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improper, and illegal, a writ of mandamus is to issue; if it is legal and properly authorized under the law and constitution the petition is to be dismissed."

A. P. Stone, for the petitioner.

G. A. A. Pevey, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the respondents, the board of health of the city of Cambridge, to grant the petitioner a license as an undertaker. Among the facts agreed are the following:

"Second. That the petitioner, Benjamin F. Wyeth, is an inhabitant of Cambridge, is an undertaker by trade, and has been for forty-six years engaged in the trade of undertaker in various capacities, and has carried on for some years past the business of undertaking under the name of Benjamin F. Wyeth; that said undertaking business as conducted by the petitioner is a profitable one, and it is his support and the support of his family; that the petitioner is the sexton of the First Church in Cambridge, and the members in attendance at that church and other residents of Cambridge and the vicinity have been accustomed from time to time to engage him to perform such services as may be required in connection with the burial of the dead.

"Third. That the petitioner, Benjamin F. Wyeth, is a competent undertaker and is well versed in the duties and practices of that trade or business, except in so far as he is ignorant of the processes of embalming.

"Fourth. That the petitioner, Benjamin F. Wyeth, does not hold himself out to the public as one skilled in the methods of embalming dead bodies, and has not and never has had, and has not applied for, a certificate or license from the board of registration in embalming to enable him to engage in the business of embalming dead bodies.

"Fifth. That a large part of the petitioner's trade or business does not require a knowledge of embalming, and in many instances the petitioner is not required nor directed to embalm the bodies of the dead intrusted to his care.

"Sixth. That in all cases in which the said Benjamin F. Wyeth has had occasion to have the bodies of the dead embalmed, he has, since January 1, 1906, procured the services of an embalmer duly registered by the board of registration in

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embalming, or he has intrusted the work to some servant or agent in his employ who was duly registered as aforesaid.

"Seventh. That the respondents to this petition or their predecessors in office had, up to and including the first day of May, 1907, always given to the said Benjamin F. Wyeth a license to act as undertaker upon his application therefor."

From other facts in the case and from the respondent's answer, it appears that the only reason for refusing to grant the petitioner a license as an undertaker is that he is not licensed as an embalmer. He cannot obtain a license as an embalmer without making application under Rule 2, § 1, adopted by the board of registration in embalming, and complying with the requirements of this section, which is as follows:

"The applicant must have taken a regular course at a reputable school of embalming whose course of instruction is satisfactory to this board, and must have had not less than a year and a half of experience in active work with a practising embalmer."

The question of law presented by the report of the single justice is whether the respondent's refusal to grant a license, solely for this reason, is legal.

The St. 1905, c. 473, is "An Act to Establish a Board of Registration in Embalming." Under § 6 the board is to adopt "rules and regulations not inconsistent with the provisions of this act and the statutes of the Commonwealth governing the care and disposition of human dead bodies and the business of embalming." Under the authority of this section the board has adopted rules and regulations whereby they assume to put the whole business of the management of funerals and the burial of the dead in the hands of persons holding a license as embalmers from this board. The first part of Rule 9, § 2, is as follows: "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks or selectmen of a town, or any other persons authorized to issue burial permits, to any person or persons who have not been registered and received a certificate from the State board of registration in embalming." Under this rule no one can bury lawfully the dead body of a former member of his family unless the permit for burial is obtained by a licensee of this board. No one can perform the

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ordinary duties of an undertaker without first having procured a license as an embalmer. No one can obtain a permit for the disinterment of a dead body for any cause, at any time however long after the burial, unless he is a licensed embalmer. Surely the fitness of a person to receive a permit for the disinterment of a dead body cannot depend upon his knowledge or ignorance of the process of embalming. The question is presented whether there is any warrant under the Constitution and the laws for this interference with the liberties of the people.

The respondents in their answer rest their defense largely upon the action of the board of registration in embalming, and adopt as their own the views upon which this action presumably was founded.

The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the Constitution of the United States, which does not permit a State to deprive any person of life, liberty or property without due process of law. The nature of this right has been stated and illustrated in many cases. *Commonwealth* v. *Strauss*, 191 Mass. 545. *Commonwealth* v. *Perry*, 155 Mass. 117. *Winthrop* v. *New England Chocolate Co.* 180 Mass. 464. *Austin* v. *Murray*, 16 Pick. 121. *Lochner* v. *New York*, 198 U. S. 45. *Allgeyer* v. *Louisiana*, 165 U. S. 578. *Yick Wo* v. *Hopkins*, 118 U. S. 356. *Minnesota* v. *Barber*, 136 U. S. 313.

There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal, and the refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, is also an interference with a private right that is not allowable under the Constitution of the Commonwealth or the Constitution of the United States.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety or the public morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the State, and no other interference of the public to the detriment of an individual is permissible.

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The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of it its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the Legislature of this State has made elaborate provisions and strict regulations covering these subjects. R. L. c. 78, §§ 37 to 44 inclusive; c. 29, §§ 6–8, 10–12, 15. Of its power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety, there is no question.

No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health.

The only particular in which the respondents have suggested, either in their answer or their argument, that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. To use the language of the agreed statement of facts, "In the opinion of the respondent board of health these rules for preserving and embalming human dead bodies have a tendency to and do increase, on the part of the undertaker, the knowledge of the nature of the disease from which the party deceased may have suffered, and which may have caused death." There is certainly a grave reason to doubt the correctness of this opinion. No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But if there may be some slight increase of knowledge, from this source, to one preparing a human

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body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. As was said in the opinion in *Lochner* v. *New York*, 198 U. S. 45, 57, "the mere assertion that the subject relates though but in a remote degree to the public health does not render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." From such a possibility no such benefit could come as to justify a requirement that all human bodies should be embalmed for the purpose of procuring such information in regard to the cause of death as can be acquired through the process of embalming, or a requirement that an embalmer should always be employed as undertaker for the chance of a valuable discovery from his observation, without his using the process of embalming. The law recognizes direct ways of ascertaining whether death was from a contagious disease, without employing an embalmer for that purpose. R. L. c. 29, §§ 1–6, 10–12. These ways seem a thousandfold more important and reliable than any possible knowledge that an embalmer might have from his training in that business, beyond the knowledge of an undertaker of experience who was not an embalmer.

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the State. If such a regulation had been made by an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking

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unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the Supreme Court of that State. *People* v. *Ringe*. 125 App. Div. (N. Y.) 592.

From another point of view the rules and regulations of the board of registration in embalming, relied on by the respondents as an important reason for their decision, are invalid. In *Brodbine* v. *Revere*, 182 Mass. 598, 600, is this language: "It is well established in this Commonwealth and elsewhere, that the Legislature cannot delegate the power to make laws, conferred upon it by a constitution like that of Massachusetts." Then follow numerous citations from different States, with the words: "This doctrine is held by the courts almost universally." None of the cases referred to later in the opinion, in which there was a delegation of legislative authority for a local or special purpose or in matters of administration, and none of the cases which have been decided since, and which are referred to in *Commonwealth* v. *Kingsbury*, 199 Mass. 542, go far enough to legalize a delegation of authority to change a general law for all the people of the Commonwealth, with no local or special reason for seeking the aid of an administrative board, as the rule about the issuing of permits and some of the other rules of this board purport to change the general laws on this subject for all the people in every city and town in the Commonwealth. If the statute were construed to authorize the making of such rules, it would be held unconstitutional as assuming to delegate general legislative authority.

We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper and illegal. According to the report, upon this determination of the question of law, a writ of mandamus is to issue. The case being on the law side of the court, only questions of law could be reported to the full court, and by the terms of the report the question of discretion whether to grant the writ must be taken to have been decided in favor of the petitioner. The report is equivalent to a finding upon the answer and the facts agreed that the only reason for the respondents' refusal was that the petitioner was not licensed as an embalmer, and that, except

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for this, the respondents in the exercise of their judgment and discretion would have granted the license. Upon these facts nothing remains but to enter the order.

Peremptory writ of mandamus to issue.

MUTUAL LOAN COMPANY *vs.* GEORGE J. MARTELL.

Suffolk. November 24, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Assignment, Of wages. *Constitutional Law,* Police power, Equal protection of the laws, Unconstitutionality of part of statute. *Small Loans Act. Husband and Wife. Wages.*

St. 1908, c. 605, § 7, providing that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and § 8 of the same chapter, providing that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are constitutional as a proper exercise of the police power in legislating for the public welfare.

The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are not unconstitutional in making a distinction between assignments to secure loans of money and assignments as security for necessaries or other property furnished or to be furnished.

The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are not made unconstitutional by the provision of § 6 of the same chapter excepting from the operation of the statute "national banks, all banking institutions under the supervision of the bank commissioner, and loan companies and loan associations established by special charter and placed under said supervision."

The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are so far separable from the provisions contained in the sec-

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tions of the same statute preceding § 6, that it may be assumed that the Legislature would have enacted them even if they had thought that the sections preceding § 6 would be held to be of no effect, and are constitutional whether such preceding sections are constitutional or not, no opinion in regard to the constitutionality of such preceding sections being intimated.

KNOWLTON, C. J. This is an action of contract to recover the amount of two promissory notes for $27.50 each, which were given by two different persons, with an assignment by each of wages to be earned in the future in the defendant's service. The declaration contains two counts, one for the amount of each note, and in each count it is averred that the assignment was recorded in the clerk's office of the city of Boston and a copy of it served on the defendant, and that the assignor earned wages to the amount of the note in the service of the defendant, which the defendant is bound, under the assignment, to pay to the plaintiff. The case comes before us upon an agreed statement of facts, under which a judgment for the defendant was ordered in the Superior Court and the plaintiff appealed.

The defence is founded upon the St. 1908, c. 605, of which §§ 7 and 8 are as follows:

"Section 7. No assignment of or order for wages to be earned in the future, to secure a loan of less than two hundred dollars, shall be valid against an employer of the person making said assignment or order, until said assignment or order is accepted in writing by the employer, and said assignment or order and the acceptance of the same have been filed and recorded with the clerk of the city or town where the party making said assignment or order resides, if a resident of the Commonwealth, or in which he is employed, if not a resident of the Commonwealth.

"Section 8. No such assignment of or order for wages to be earned in the future shall be valid when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto."

Section 6 has this provision: "National banks, all banking institutions which are under the supervision of the bank commissioner, and loan companies and loan associations established by special charters and placed under State supervision shall be exempt from the provisions of this act."

Neither of these assignments was accepted in writing by the

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employer as required by § 7, and the assignor in the second assignment was a married man whose wife did not consent in writing to the making of the assignment. The question presented for our consideration is whether §§ 7 and 8 are constitutional.

These sections interfere with the rights of the assignor and assignee to contract with each other, which right of contract, in general, is secured to all our citizens under the Fourteenth Amendment to the Constitution of the United States, as well as under the Constitution of Massachusetts. Such an interference by law with one's right to manage his property and to make contracts in relation to it and to pursue any proper vocation is in violation of such constitutional rights, unless it can be justified upon an independent ground. The defendant contends that there is such justification, in the present case, in the enactment of this statute by the Legislature in the exercise of the police power.

The State may legislate for the public health, the public safety, the public morals and the public welfare, in the exercise of this power. But, in balancing this right of the State against the constitutional right of the individual to personal liberty, it is often difficult to draw the line between permissible and impermissible legislation. The subject has been considered in many cases. *Commonwealth* v. *Strauss*, 191 Mass. 545. *Commonwealth* v. *Pear*, 183 Mass. 242. *Commonwealth* v. *Interstate Consolidated Street Railway*, 187 Mass. 436. *Welsh* v. *Swasey*, 193 Mass. 364. *Squire* v. *Tellier*, 185 Mass. 18. *Commonwealth* v. *Perry*, 155 Mass. 117. *Wyeth* v. *Cambridge Board of Health*, *ante*, 474. *Field* v. *Barber Asphalt Paving Co.* 194 U. S. 618, 621. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. *Lochner* v. *New York*, 198 U. S. 45, 58.

In the present case we have to inquire how far the welfare of the community requires an interference by way of regulation with the right of workmen to dispose of their wages to be earned in the future. For many years statutes have been enacted in this Commonwealth, and in other States, with a view to secure such wages against the bankruptcy of employers and other hazards. To a certain amount they are made a preferred claim

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in statutes relating to insolvency and bankruptcy. R. L. c. 163, § 118. U. S. St. 1898, c. 541, § 64. To a certain amount they are exempt from attachment by trustee process. R. L. c. 189, § 27. They are required by law to be paid weekly, and the statute requiring it has been held constitutional. R. L. c. 106, § 62. *Opinion of the Justices*, 163 Mass. 589. It has been deemed important that they be received by the employee regularly and promptly after they are earned.

In *International Text-Book Co.* v. *Weissinger*, 160 Ind. 349, the court, in deciding that a statute which forbids altogether the assignment of future earnings of an employee was constitutional, used this language: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessaries of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service, — anticipation of pecuniary reward in the near future, — their effect would be alike injurious to the laborer and his employer." Without deciding, as the Supreme Court of Indiana did, that these considerations would furnish the Legislature constitutional authority for forbidding all assignments of future wages, we think they justify a strict regulation of the right to make such contracts. The requirement that they be recorded is certainly reasonable. It tends to lessen the opportunity of wage earners to be dishonest in procuring credit on the faith of their expected possession of earnings, as they might be if unrecorded assignments were outstanding. The requirement that the order or assignment be accepted in writing by the employer tends to diminish the risk of his refusal to pay, involving litigation the result of which

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might be loss of employment by the wage earner and injury to the business of the employer. Then, too, this requirement might operate as a check upon the rapacity of unscrupulous money lenders who are inclined to take advantage of the needs of employees. If the Legislature saw an advantage to the community from this provision, we cannot say that they were acting beyond their constitutional authority in enacting the law.

Nor can we say that they might not find grounds for a distinction between assignments to secure loans of money and assignments as security for necessaries or other property furnished or to be furnished. The occasions for making assignments as security for necessaries may be far more pressing than for making them to obtain money, and the risk of wasting that which is obtained may be much less in one case than in the other. The statute is not unconstitutional because it deals only with security for loans and does not include security for other debts.

Section 8 presents a similar but more difficult question. A married man is bound by law to support his wife. If he is a wage earner, although she has no legal title to his wages, she has an interest in the right use of them. If there are such risks of his making an improper disposition of them by assigning them to secure the payment of money that he borrows for unnecessary purposes as to justify the Legislature in limiting and regulating his exercise of this right, might they not regulate it by requiring the consent of his wife as a prerequisite to the validity of his assignment? A strong argument can be made in favor of the plaintiff's contention on this point. But on the whole we are of opinion that the Legislature might look chiefly to the ordinary relations between husband and wife under the law, and adopt this form of regulation as salutary in its application to most members of the class with which they were dealing. The principles that are applicable to § 7 require us to hold § 8 to be constitutional.

It is contended that these sections are unconstitutional because of the provision of § 6 that renders the act inapplicable to certain banks, banking institutions and loan companies. The argument is that this makes a discrimination without reason, and thus deprives others of the "equal protection of the laws," secured by the

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Fourteenth Amendment to the Constitution of the United States. This would be so if no reason could be discovered by the Legislature for making the discrimination. But seemingly the Legislature might decide that the dangers which the statute was intended to prevent would not exist in any considerable degree from the business of national banks, or other banking institutions under the supervision of the bank commissioner, or from that conducted by a loan company established by a special charter and placed under the supervision of this commissioner. The Legislature may be supposed to have known the kind of business done and likely to be done by these corporations, and they may have believed rightly that the business done by them would not need regulation in the interest of employees or employers. This was held by the Supreme Court of Delaware in an elaborate opinion in a similar case. *State* v. *Wickenhoefer*, 64 Atl. Rep. 273.

A large number of States have enacted statutes regulating to a greater or less degree the assignment of future earnings as security for debts. Several decisions have been made upholding the constitutionality of laws securing to employees payment of their wages in money. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13. *Hancock* v. *Yaden*, 121 Ind. 366. *State* v. *Peel Splint Coal Co.* 36 W. Va. 802, 822. The Supreme Court of Illinois has made a contrary decision. *Massie* v. *Cessna*, June, 1908.*

In this Commonwealth the St. 1905, c. 308, limiting the right to make assignments of future earnings to a period not exceeding two years, has been held constitutional. *McCallum* v. *Simplex Electrical Co.* 197 Mass. 388. So also has the statute regulating the business of pawnbrokers. *Commonwealth* v. *Danziger*, 176 Mass. 290. We are of opinion that these two sections of the statute are constitutional.

The first part of the statute we have no occasion now to consider. The last part of the act is so far separable from the other that the Legislature probably would have enacted it by itself, if they had supposed that they could not constitutionally enact the other. Without intimating an opinion in regard to the other, we are of opinion that this can stand by itself. *Edwards* v. *Bruorton*, 184 Mass. 529. *Commonwealth* v. *Petranich*, 183

* On October 26, 1908, a motion for a rehearing of this case was granted.

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Mass. 217. *Commonwealth* v. *Anselvich*, 186 Mass. 376, 379. *Commonwealth* v. *Hana*, 195 Mass. 262.

Judgment affirmed.

The case was submitted on briefs.

P. W. Carver & A. G. Carver, for the plaintiff.

O. C. Scales, for the defendant.

G. A. Ham, for the Mill Men's Association of Greater Boston, filed a brief by leave of court.

LAWRENCE W. JENKINS *vs.* HENRY E. WESTON & another.

Suffolk. November 30, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Evidence, Remoteness, Opinion: experts. *Probate Court*, What parties may oppose allowance of will. *Will*. *Waiver*.

At the trial, on an appeal from a decree of the Probate Court disallowing a will, of an issue as to the soundness of mind of an alleged testator on May 20, 1905, the time of the execution of the instrument offered for probate as his will, the presiding justice without objection by the petitioner "fixed January 1, 1901, as the reasonable limit of time as to which evidence of the condition of the testator could be introduced." The contestants offered evidence as to acts and conduct of the alleged testator between January 1 and January 8, 1901, tending to show such unsoundness, and also the opinion of a physician, who attended the testator from January 8 to February 19, 1901, that he was not then of sound mind, and the evidence was admitted, the petitioner alleging an exception solely on the ground of remoteness. *Held*, that the exception must be overruled, the question as to whether the evidence was too remote being one to be determined by the presiding justice in his discretion, and there being nothing to indicate that such discretion was not exercised rightly.

At the trial, on an appeal from a decree of the Probate Court disallowing a will, of the issue whether or not the alleged testator was of sound mind, the following statements by a witness were admitted in evidence: that, at a time not too remote from the time of the executing of the alleged will, the testator "seemed to want to" superintend some work, "but could not concentrate his thoughts"; that the testator's habits in the use of liquor (such use and the excessive use of cigarettes being alleged to have caused general paresis resulting in mental unsoundness) never changed "but seemed rather to have a fuller mastery"; that on a certain occasion the testator committed "the deliberate act of scaring horses driven by" the witness, resulting in an arm and some of the ribs of the witness being broken, and, although the testator was present at the scene which followed, "it was not until the following day that he came to say that he had just heard of the accident." The statements were objected to as including expressions of opinion. *Held*, that the statements fairly came within the rule

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that a witness may state the results of his observation, even though that does in some measure involve his opinion or judgment as to matters which cannot be exactly reproduced or described to the jury precisely as they appeared to the witness.

At the trial of an issue, framed on an appeal from a decree of the Probate Court disallowing a will, as to whether the alleged testator was of sound mind at the time of the execution of the will, there appeared as appellees, contesting the validity of the will, one who was next of kin to the testator, and also one who alleged that he was a creditor of the testator and that by agreement with the testator as such creditor he had been made a beneficiary in a former will of the testator. Without any objection on the part of the appellant, and with the concurrence of counsel for the next of kin, the active conduct of the case of both of the appellees was carried on by counsel for the creditor, he opening the case to the jury, calling all the witnesses, offering depositions which he had procured to be taken and cross-examining witnesses. At the close of the evidence, the appellants requested the presiding justice to rule in substance that upon all the evidence the creditor had no standing to oppose the allowance of the will, and that his rights would not be affected adversely by its allowance. The rulings requested were refused, the creditor's counsel was allowed to make the closing argument to the jury for the appellees, and the appellant alleged exceptions. *Held*, that the question whether the creditor had any standing to object to the allowance of the will was not open on the exceptions, since the jury were not to determine whether the will should be allowed, but solely to answer the question put to them with regard to the soundness of mind of the alleged testator. *Held*, also, that under the circumstances the presiding justice was right in allowing the counsel for the creditor to make the closing argument for the appellees.

APPEAL from a decree of the Probate Court disallowing the will of William H. Weston late of Boston.

The case was tried in the Supreme Judicial Court before *Rugg*, J., upon the following issue framed for the jury: "Was William H. Weston of sound and disposing mind and memory at the time of the execution of the instrument offered for probate as his last will and testament?"

There were upon the record two contestants to the allowance of the will: Henry E. Weston, a brother and next of kin of the testator, and Marland L. Pratt, a creditor. At the trial Henry E. Weston was represented by A. Berenson, Esquire, as his attorney, who called no witnesses, relying upon the evidence introduced by others, and took no part in the trial except to ask a question or two of the witnesses for the petitioner, and to assist in the preparation, and, by conference with other counsel, in the trial of the case. Marland L. Pratt was represented by L. D. Brandeis, Esquire, and E. A. Wilkie, Esquire, as attorneys, caused to be taken and read the depositions of Dr. MacDonald

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and W. R. Heakes, hereinafter referred to, and caused to be called all the witnesses who were examined on behalf of the contestants, and his counsel, in his behalf, made the opening and closing address to the jury, and in opening said to the jury that he appeared for Mr. Pratt, who contested as a creditor.

It appeared that the will was executed on April 25, 1905, and that the testator died on May 20, 1905. It was contended by the respondents that the testator was of unsound mind as the result of general paresis and alcoholism and cigarette smoking. The single justice fixed January 1, 1901, as the reasonable limit of time as to which evidence of the condition of the testator could be introduced.

The contestant Pratt testified in his own behalf and identified the following four telegrams:

"Sherbrooke, N. S. January 1, 190 . To H. Harris Phinney, 540 Tremont Building, Boston. Have good report — send notice — close — keep water out — wait until letter tomorrow mail — forward Marly news — answer immediately. W. H. Weston."

"Sherbrooke, N. S. January 1, 1901. To H. Harris Phinney, 540 Tremont Building, Boston. Have discovered snag why I ran behind — writing tomorrow. W. H. Weston."

"Sherbrooke, N. S. Jan. 3, 1901. To H. Harris Phinney, 540 Tremont Building, Boston. Case of mesmerism by Dr. Ellis — you come or send some one to Sherbrooke, to McDaniel's Hotel — this is explanation — answer. W. H. Weston."

"Antigonish, N. S. February 20, 1901. Mr. M. L. Pratt, Boston A. A. Think Weston insane, but keep my opinion from him — have him see specialist — would suggest Putnam. W. Huntley MacDonald."

The witness testified that he first saw the telegrams about January 5, 1901, and later talked with the testator about them. The telegrams then were offered in evidence as statements bearing on the testator's mental condition at that time, and, subject to the petitioner's objection as too remote, and to his exception, were admitted to prove a progressive disease of general paresis.

The testimony of the witness Heakes, objected to by the petitioner, was contained in a deposition, from which it appeared that the witness saw the testator daily for a period from some

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time in 1901 until he left Nova Scotia. In answer to the interrogatory, "Did you observe in your association with said William H. Weston any incoherence in the talk and conversation of said Weston?" he aswered "Yes," and to the interrogatory, "If so, please state as many instances of such as you can recall," subject to the petitioner's exception, he answered, "Sometimes in consulting him on matters which he tried to superintend it was impossible to get any intelligent information; he seemed to want to do it, but could not concentrate his thoughts." To the interrogatory, "If within your knowledge he used any of these [intoxicants, drugs, or tobacco] please state which, to what extent, and whether his use of such articles, or any of them, increased or decreased during the time of your association with the said Weston," the answer was "From the time I first saw Weston until he left Nova Scotia he was addicted to the use of liquor. These habits never changed, but seemed rather to have a fuller mastery." The petitioner objected to the last words of the answer, "but seemed rather to have a fuller mastery," but the same were admitted subject to his exception. In answer to the interrogatory "Please state whether or not, within the time you knew him intimately, said Weston failed mentally or physically," he answered, "Yes, both"; and to the interrogatory "If so, please state, as far as you remember, any particular instances or details from which said knowledge has been acquired," he answered, "On one occasion the placing of a large order for general mining supplies with Mr. Percy Austin of Halifax, afterwards denying it, supplies being returned to shipper. The deliberate act of scaring horses driven by me in the middle of the night, causing me the slight inconvenience of a broken arm and a few broken ribs; although Weston was present at the scene which followed, it was not until the following day that he came to say he had just heard of my accident." To the last paragraph of this answer, beginning with "deliberate act of scaring horses," the petitioner objected, but it was admitted subject to his exception.

The deposition of W. Huntley MacDonald of Antigonish, Nova Scotia, was read, from which it appeared that he was a physician and had been practising for twelve years; that he knew the testator professionally at Antigonish from January 8

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to February 19, 1901, and rendered him medical attendance; that he was acquainted with his habits and manner of living; that his habits were irregular; that he was a hard drinker of alcoholic liquors; that he was an inveterate cigarette smoker; that in the deponent's opinion the continuation of such habits would render him a physical and mental wreck. To the interrogatory "At the time you knew him did you consider Mr. Weston to be of sound and disposing mind and memory?" the deponent answered, "At the time I knew Mr. Weston I did not consider Mr. Weston to be of sound mind"; and to the next interrogatory, "If not, please state concisely, briefly, and in particular the circumstances, if any, upon which you base your opinion to interrogatory 9"; he answered, "He was not apparently aware of his physical and mental condition, and I could not impress upon him the necessity of his giving up his habits of living. He did not give intelligent answers to all my questions, and seemed reckless as to the state of physical or mental health he might attain, and seemed dull in both comprehending and answering questions I asked him, — and seemed to have an inane and silly manner in understanding and answering questions. He was also a sufferer from alcoholic neuritis." To the answers to both of the last two interrogatories the petitioner objected on the sole ground that they were too remote.

At the close of the testimony the petitioner asked the presiding justice to rule and instruct the jury as follows:

1. Upon all the evidence the respondent Marland L. Pratt has no standing to object to the allowance of the will of May 2, 1905.

2. The allowance of the will in question, dated May 2, 1905, will not affect the rights of Marland L. Pratt adversely.

3. A written contract to make a will in favor of a certain person is binding, and gives the party with whom the contract is made the rights of a creditor in case the contract is not kept.

The rulings were refused by the presiding justice, the jury answered the question put to them in the negative; and the petitioner alleged exceptions.

W. C. Cogswell & H. R. Bailey, for the petitioner.

A. Berenson, for the respondent Weston.

A. C. Vinton, for the respondent Pratt.

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SHELDON, J. 1. The petitioner's exceptions to the admission of testimony cannot be sustained.

The telegrams admitted were objected to only as being too remote. But each one of them was within the limit of time which previously had been fixed by the single justice, so far as appears without objection by either party. Three of these telegrams, those sent by the alleged testator, come within the general doctrine that the appearance, acts, conduct and declarations of one whose mental condition is in issue may be put in evidence, if they are of such a character as to throw light upon that question, and if they are not too remote in time. And whether they are too remote in time is a question which must be determined in the discretion of the justice who presides at the trial and hears the evidence, and his conclusion is not to be reversed unless it was manifestly unfounded. *Hagar* v. *Norton*, 188 Mass. 47, 52. *McCoy* v. *Jordan*, 184 Mass. 575, 576, 577. *Lane* v. *Moore*, 151 Mass. 87, 90. *Commonwealth* v. *Pomeroy*, 117 Mass. 143, 148. *Shailer* v. *Bumstead*, 99 Mass. 112, 130. We find nothing to indicate that this discretion was not rightly exercised in the case at bar. And for the same reason the testimony of Dr. MacDonald to his opinion that the alleged testator was of unsound mind early in 1901 and to the grounds of this opinion, was competent. It was not contended that Dr. MacDonald, who had been an attending physician to the deceased, was not qualified under our rules to express an opinion.

The testimony of Heakes was not incompetent as including statements of his mere opinion. He testified to the things which he himself had observed. His testimony cannot be said to have been irresponsive. It does not appear to have gone beyond his personal knowledge. It comes fairly within the rule that a witness may state the results of his observation, even though this does in some measure involve his opinion or judgment as to matters which cannot be exactly reproduced or described to the jury precisely as they appear to the witness. So far as they include opinions, these are rather conclusions in the nature of facts which have become a part of the knowledge of the witness than mere opinions. They are received *ex necessitate*, because of the impossibility of reproducing the numerous particular facts upon which they are founded. This is the general doctrine of

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our decisions. *Partelow* v. *Newton & Boston Street Railway*, 196 Mass. 24, 31. *McCoy* v. *Jordan*, 184 Mass. 575, 578. *O'Neil* v. *Hanscom*, 175 Mass. 313. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 123. *Barker* v. *Comins*, 110 Mass. 477. *Parker* v. *Boston & Hingham Steamboat Co.* 109 Mass. 449. This doctrine was fully discussed, with abundant citation of authorities by Rugg, J., in *Gorham* v. *Moor*, 197 Mass. 522.

2. The question whether Pratt had any standing to object to the allowance of the will is not open upon these exceptions. The jury were not to determine whether the will should be allowed, but simply to pass upon the issue whether the alleged testator was of sound and disposing mind and memory. No question was raised when the case was opened to the jury or while the evidence was going in, of the right of Pratt as well as of Henry E. Weston to participate in the trial. Apparently by arrangement between these two as contestants, the active management of the contest against the will was left mainly to Pratt's counsel. It was he who called all the witnesses for the contestants, who had procured and who put in the depositions taken in their behalf, who cross-examined the petitioner's witnesses except for "a question or two" put by the other counsel, and who substantially conducted the whole trial, and manifestly was relied upon by both contestants to make the concluding argument to the jury. All this had been done with the concurrence of the other contestant, and without any hint of objection by the petitioner. Under this state of facts, the justice had a perfect right to allow Pratt's counsel to make the closing argument to the jury, if indeed he was not bound to do so. It could not be material whether the counsel in making that argument was to be regarded as acting for the one or for the other contestant. It was the weight of his reasoning and not his representative capacity that was to be considered. If his argument contained anything objectionable, yet the petitioner did not care to make the objection or to ask for any rulings with reference thereto. And the justice might well refuse to give to the jury either of the three instructions asked for. None of them had any bearing upon the only issue which was to be submitted to the jury, and upon which alone it was the duty of the justice to instruct them; and the giving of them could have had no other effect

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than to distract the attention of the jury from that issue. Accordingly, we need not consider the very interesting question whether Pratt, by reason of the appointment made in a former will in his favor, had any right to object to the allowance of this will, or whether any of his rights would have been injuriously affected by such allowance. If, now that it has been settled by the verdict of the jury that William H. Weston was of unsound mind when he executed this alleged will (*Busiere* v. *Reilly*, 189 Mass. 518, 520; *Crocker* v. *Crocker*, 188 Mass. 16), the petitioner cares to raise the question of Pratt's right to be heard in opposition to its allowance, we need not consider whether he can do so at the hearing which will be had before a single justice to determine what decree shall be entered.

The bill of exceptions stated that adequate instructions, to which no exception was taken, were given as to all issues other than those referred to in the three requests for rulings. This was all that was called for.

Exceptions overruled.

MARY J. BOARDMAN *vs.* FRANCIS S. HESSELTINE.

Middlesex. December 1, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Probate Court, Petition to revoke decree allowing will. *Fraud. Will.*

After the proof and allowance of a will, the widow of the testator filed a petition in the Probate Court, alleging that at the time when he signed the will her husband was of unsound mind, that the will was not legally executed, and that the executor who sought and procured its proof and allowance knew such facts and procured the proof and allowance by fraud. The Probate Court dismissed the petition, and it was heard on appeal by a single justice of this court, who found that the petitioner had opposed the allowance of the will in the Probate Court, that thereafter she had appealed from such allowance and that, after the entry of the appeal in this court, a waiver of appeal had been filed, which was signed by her personally and the purport of which she understood when she signed it; that after the allowance of the will she had not waived its provisions, but had received payments of sums directed by its provisions to be paid to her, and that there was no fraudulent concealment by the executor as alleged. The single justice, on the facts found by him, dismissed the petition. *Held*, that the dismissal of the petition was proper.

At a hearing before a single justice of an appeal from a decree of the Probate Court dismissing a petition for the revocation of a previous decree of that

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court allowing a will, where the petition which is being heard on appeal alleges that the previous decree was procured by fraud of the person named as executor in the will through his concealing from the court the facts that the alleged testator was of unsound mind when he executed the instrument and that it was not legally executed, it is proper for the justice to refuse to hear evidence as to whether or not the alleged testator was of sound mind when he executed the instrument except in connection with evidence which might tend to show knowledge on the part of the executor of the unsoundness of mind of the testator when he executed the will, or fraud of the executor in procuring the allowance of the will, since the issues as to the execution of the will and the soundness of mind of the testator, having been fully tried and determined, could not be reopened by such a petition merely on the ground that they were not decided in accordance with the facts.

PETITION, filed in the Probate Court for the county of Middlesex by the widow of George F. Boardman late of Melrose, seeking a revocation of a decree of that court allowing the will of Boardman.

The petition was dismissed in the Probate Court by *Lawton*, J. On appeal to the Supreme Judicial Court, the case was heard by *Morton*, J., who dismissed the petition and reported the facts for the determination by the full court as to the correctness of his ruling. The facts are stated in the opinion.

E. F. Brady, for the petitioner.

F. S. Hesseltine & W. D. Gray, for the respondent, were not called upon.

KNOWLTON, C. J. The petitioner, who is the widow of George F. Boardman, brought this petition for a revocation of a decree of the Probate Court, ordering the probate and allowance of her husband's will. In her petition she averred that the will was not legally executed, and that her husband was not of sound mind when he signed it. Subsequently she filed an amendment to the petition, charging that the probate and allowance of the will were obtained by fraud of the person named in it as executor. The petition was dismissed by the Probate Court and the petitioner appealed.

At the hearing before a single justice of this court, he found, among others, the following facts. The petitioner appeared and contested the allowance of the will in the Probate Court and was duly heard. The will was allowed and she appealed. The appeal came on for hearing in the Supreme Judicial Court, after due notice to the petitioner and her counsel. A waiver of the appeal was filed by her counsel, and thereupon, after a hearing,

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the decree was affirmed and the case was remitted to the Probate Court. She took no steps to have this revoked until the filing of this petition, nearly two years after the final allowance of the will. She discharged the counsel who acted for her in the original proceedings and employed other counsel, and afterwards, acting either under advice or of her own motion, she decided not to waive the provisions of the will, and did not waive them. Through her counsel she received from the executor and trustee the annuity which was payable to her under the will, for herself and her children, and receipted for it. The executor did not intentionally and fraudulently conceal from the Probate Court, as alleged in the petition, the fact that George F. Boardman was not of sound mind at the time of the execution of the will, and did not know that the instrument had not been signed by said Boardman in the presence of three attesting witnesses, and did not perpetrate a fraud upon the court in offering the instrument for probate and in securing the allowance of it. All the persons whose depositions were annexed to the petition, in support of it, testified originally in the Probate Court, either for the proponent or the testator. The petitioner averred in her petition that she did not contest the will in the Probate Court, and introduced evidence tending to show that the instrument that she signed, which was a waiver of appeal, was not a waiver of the appeal, but a request for a continuance. The judge found against her on these points, and believed that when she signed the paper she knew it was a waiver of the appeal, and not a request for a continuance.

The judge ruled that the petitioner could introduce any evidence tending to show that a fraud was practised upon the court in procuring the probate of the will, but declined to hear evidence that the testator was not of sound mind, except in connection with evidence which might tend to show knowledge of the testator's unsoundness of mind on the part of the executor, or which might tend to show fraud of the executor in procuring the probate of the will.

Upon these facts and findings it is plain that the petition was rightly dismissed. No reason is shown for revoking the decree allowing the will and trying the case again. The issues as to the execution of the will and the soundness of mind of the tes-

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tator were fully tried and regularly determined. They cannot be opened, simply on the ground that the decision was not in accordance with the facts. The judge was right in excluding evidence on these issues, in the absence of testimony tending to show the practice of fraud upon the court, or some accident or mistake or misunderstanding in the proceedings before the court, such as, in justice, should call for a revocation of the decree and a rehearing of the case. *Waters* v. *Stickney*, 12 Allen, 1. *Gale* v. *Nickerson*, 144 Mass. 415. *Tucker* v. *Fisk*, 154 Mass. 574. *Crocker* v. *Crocker*, 198 Mass. 401.

Decree of Probate Court affirmed.

MARY A. CASHMAN *vs.* EDWARD A. BANGS & others.

Suffolk. December 8, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Devise and Legacy, What estate. *Trust*, Alienability of interest of beneficiary. *Assignment*. *Equity Jurisdiction*, To reach and apply equitable interest. *Equity Pleading and Practice*, Costs.

Where one undivided third of certain real estate is devised to a trustee "the net income . . . to pay to my son E. during his life, or to permit him to occupy and enjoy the use of said property in common with his brothers as he may prefer," the right of E. to one third of the income is an equitable interest which can be reached by his creditors by a bill in equity at any time when he chooses to receive such income rather than to avail himself of the permission given him to occupy the property in common with his brothers; but, while he is availing himself of the privilege of such occupation, he has no right which his creditors can reach, since such privilege is personal to him and unassignable and inalienable.

By the provisions of a will an undivided one third interest in certain real estate was devised to a trustee "the net income . . . to pay to . . . E. during his life." E. made an agreement in writing for a good consideration that his life interest "shall remain so held in trust, but if at any time any of said properties shall be sold, the value of the life interest of E. in the proceeds shall be computed . . . and shall be" applied by E. or the trustee in payment of certain debts due other parties to the agreement, "or if the said trustee shall prefer he may invest E.'s share of such proceeds and pay or apply the income thereof during the life of E. upon such" debts. A creditor of E. who was not a party to the agreement sought by a bill in equity to reach and apply the interest of E. under the will, and contended that he was not affected by the agreement because it was

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not recorded under R. L. c. 127, § 4, as a conveyance of real estate, and because he had no notice of it as a trust, as required by R. L. c. 147, § 3. A single justice ruled that the creditor could reach and apply in satisfaction of his debt only E.'s interest in the trust subject to the agreement, and the creditor appealed. *Held*, that the ruling of the single justice was correct, since no recording or notice of the agreement was necessary because it did not purport to convey any interest in the realty, but only in E.'s share of the proceeds in case of a sale during his lifetime.

In a suit in equity by a creditor to reach and apply in satisfaction of a debt due to the plaintiff from the principal defendant equitable assets of the principal defendant in the possession of a second defendant, where it is determined that the principal defendant owes the plaintiff as alleged, a decree, that a sale of the principal defendant's interest in the equitable assets be made and that from the proceeds there shall be paid among other items "taxable costs" to the second defendant, is not objectionable in failing to award to the second defendant costs "as between solicitor and client" since the determination of costs is a matter within the discretion of the presiding justice and nothing appears to show that such discretion was not exercised properly.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on April 30, 1907, to reach and apply in satisfaction of a debt alleged to be due to the plaintiff from the defendant Edward A. Bangs the interest of the debtor in property held in trust under the provisions of the sixteenth, seventeenth and eighteenth clauses of the will of his mother, Anne Outram Bangs.

The clauses of the will referred to were as follows:

"Sixteenth. To my sons Outram and Francis Reginald, two undivided thirds of all my real estate in Plymouth Woods and in Wareham, Massachusetts (except the Little Herring River Cranberry Bog) with all the privileges and appurtenances thereto belonging with all the furniture and other contents of the house and barn, and all the boats, live stock and other personal property of mine on said premises and the oyster grant.

"Seventeeth: To my son-in-law Robert H. Gardiner the other undivided third of all the property described in article Sixteenth of this will, but in trust for the following purposes: to hold and manage the same in common with the said Outram and Francis Reginald, and the net income from said one third to pay to my son Edward A. Bangs during his life, or to permit him to occupy and enjoy the use of said property in common with his brothers as he may prefer, and upon his death to convey and transfer said property to his said brothers, or the survivor of them, but should they predecease him, then to my heirs at law

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in equal shares, the children of any deceased child of mine to take their parents share by right of representation.

"Eighteenth. The Little Herring River Cranberry Bog which has been reclaimed from a state of nature, managed, cultivated and rendered valuable, together with the cranberry house and barn thereon and used in connection therewith, I give to said Outram, but in trust for the following purposes: to hold, manage, improve and carry on as he may think best, and the net income thereof to appropriate to his own uses during his life; but upon his death said bog shall become the property of my sons and the survivors of them, in equal shares, the children of any deceased son, including Outram, to take their parent's share by right of representation."

The agreement mentioned in the opinion is set out in the fifth paragraph of the answer of the defendant Gardiner, trustee, which was as follows:

"Subsequent to the death of said Anne Outram Bangs all the persons of full age and in being, of whom said Edward A. Bangs was one, interested in the estate passing under the will of said Anne Outram Bangs, entered into an agreement, dated December 27, 1905, on good consideration, in regard to the settlement of the estate of said Anne Outram Bangs, and that by said agreement it was provided as follows: 'The life interest of Edward A. Bangs in the property held in trust for him under the seventeenth clause of said will shall remain so held in trust, but if at any time any of said properties shall be sold, the value of the life interest of said Edward A. Bangs in the proceeds shall be computed according to the combined experience tables, at four per cent, and shall be equally paid or applied by the said Edward A. Bangs or by the trustee named in said article of said will upon the notes referred to in the sixth clause of this agreement, or upon any other obligation mentioned in this agreement of said Edward A. Bangs, the choice to be in the discretion of the said trustee; or if the said trustee shall prefer he may invest the said Edward A. Bangs' share of such proceeds and pay or apply the income thereof during the life of the said Edward A. Bangs upon such notes.'"

Certain facts were agreed to, among which were the following:

The estate devised under the sixteenth and seventeenth articles

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of the will of Anne Outram Bangs consists of about three hundred acres in the town of Wareham, Massachusetts, mainly composed of marshy wild land, covered with scrub wood and entirely uncultivated. The estate borders on Buzzards Bay, however, and there is ample opportunity for the erection of summer dwelling houses overlooking the bay. On the estate is the house lately occupied by Anne Outram Bangs during the summer, with two barns and a greenhouse adjacent thereto, and several acres of cleared land. There were at the time of the death of Anne Outram Bangs four other houses on the property. One of them was in a dilapidated condition, and since the death of Anne Outram Bangs has been put in repair by her son Outram Bangs, and is now occupied by him. Another was at the time of her death, and now is, occupied by a farmer or caretaker on the estate. The other two houses are of small value, and a rent of $50 or $100 a year can at some times be obtained for them, but the sums so obtainable are insufficient to pay the cost of the repairs and taxes on the property. Such rents as have been received from these houses have been received by Francis Reginald Bangs, the owner of an undivided third interest in the estate.

The case was heard upon the bill and answers and the agreed statement of facts by *Hammond*, J., who filed a memorandum for a decree, a portion of which was as follows:

"1. As to the interest under the seventeenth item of the will:

"(*a*) I rule that the permission to the defendant Edward A. Bangs 'to occupy and enjoy the use of said property in common with his brothers as he may prefer' is personal to him, and does not authorize him to let to tenants. The distinction is not between a letting of the property by the trustees and a letting of it by him, but between an occupation of it by him and a letting of it by the trustees to some person other than him.

"(*b*) I rule that the agreement of December 27, 1905, is good against the plaintiff, although it has not been recorded.

"(*c*) Having so ruled, I rule that the plaintiff can reach the interest of the said Edward under this seventeenth item subject to (*a*) and (*b*) above mentioned."

A decree thereupon was entered, ordering a sale of the interest of Edward A. Bangs under the eighteenth clause of the will and

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of his interest under the seventeenth clause as stated in the above memorandum, and continuing: "And it is ordered that the money raised by said sale shall be applied by said master as follows: first, to the payment of the costs and expenses of said sale; second, to the payment of the taxable costs to Outram Bangs, trustee, and to Robert H. Gardiner, trustee; third, to the payment to the plaintiff of" the debt claimed to be due. "Any balance then remaining in said master's hands shall be paid by him to the said defendant on demand."

All parties appealed from the decree, and the presiding justice at the request of the parties thereupon reported the case for determination by the full court.

Roland Gray, for the plaintiff.

R. Homans, (*F. H. Nesmith* with him,) for the defendants.

BRALEY, J. Upon proof of the debt, which does not appear to have been in dispute, the plaintiff was entitled to have applied in payment the vested interest of Edward A. Bangs in the contingent remainder devised to him by the eighteenth clause of the will of his mother, Anne Outram Bangs; and the interlocutory decree, so far as a sale was ordered of this portion of the debtor's estate, is not questioned by the defendants. R. L. c. 134, § 2. *Trumbull* v. *Trumbull*, 149 Mass. 200, 204.

The principal controversy has been confined to the construction of the seventeenth clause, and, when the nature and extent of the debtor's estate has been defined, to determine whether the plaintiff's rights of attachment are subject to the agreement that, upon a sale of his interest, the proceeds are to be applied to the payment of certain of his promissory notes held by members of the family.

By the seventeenth clause of the will he was given outright the net income for life of one third, or, at his election, he was to be permitted to occupy and enjoy the use of the estate in common with his brothers, who were seised of two undivided thirds in fee. The equitable life tenant's right to the income is absolute, but the alternative provision is not expressed so broadly. The gift is not of a general right of occupancy in land, which confers upon the devisee or beneficiary the power to occupy by a tenant. *Rabbeth* v. *Squire*, 19 Beav. 70; *S. C.* 4 DeG. & J. 406. But it is limited by the phrase "to permit

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him to occupy and enjoy the use of said property." Upon reference to the character and use of the property, which is described generally in the sixteenth clause but more particularly in the agreed facts, very likely the testatrix had in mind a probability that, if she gave to him an alienable estate in the land, her other sons might be greatly annoyed in their enjoyment and management of the property by the intrusion of a stranger. But, however that may be, these words of limitation cannot be rejected, but must be accorded their ordinary meaning. *Towle* v. *Delano*, 144 Mass. 95, 99. When this is done, the right of occupation very plainly was not intended as merely an incident to a complete life estate, but only as an alternative privilege to be exercised at his option. This freedom of choice being purely personal is not assignable, and consequently cannot be taken on execution. But until exercised, the income did not cease, and the choice of occupation, when once made, is not irrevocable by the terms of the will. The legatee might change back again to income if he desired, and, if it were not for the agreement, the plaintiff, under an appropriate decree, then could reach and apply the entire income, whenever it accrued, in satisfaction of her debt.

While not denying the right of this defendant to alienate the income, the plaintiff claims that the agreement is in the nature of a conveyance of an equitable interest in real property, which, under the provisions of R. L. c. 127, § 4, and c. 147, § 3, not having been recorded and of which she had no notice, is not valid against attaching creditors. The answer, however, is that, as the agreement does not purport to convey any interest in the realty, but only in the proceeds if a sale takes place during his life, the rights of creditors claiming under the instrument are superior, and the plaintiff can hold only what, if anything, may remain after their demands are satisfied. *Putnam* v. *Story*, 132 Mass. 205, 211. *Hill* v. *Hill*, 196 Mass. 509, 516, 518.

But if the plaintiff fails to show that the decree was erroneous, the defendant trustees ask for a reversal of the part which gave to them only taxable costs, and that costs may be taxed as between solicitor and client. The suit is neither for instructions as to the construction of a will, even if that question is involved, nor a bill of interpleader to determine the title of claimants to a fund, nor for the benefit of all in the preservation of a fund

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in which many persons have a common interest, where usually costs are taxed as between solicitor and client, to be paid out of the fund. *Davis* v. *Bay State League*, 158 Mass. 434, 435, and cases cited. But it is a creditor's bill analogous to the process of foreign attachment under which, by R. L. c. 189, § 67, the trustee recovers only taxable costs, "and such further amount for counsel fees and other necessary expenses as the court may allow." What sum, if any, should be allowed for such disbursements was discretionary with the single justice, and although the report presents all questions which were before him, we see no sufficient reason to differ from his conclusion.

Decree affirmed.

WILLIAM H. SMITH *vs.* JOHN PEACH.

Suffolk. December 7, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Proximate cause. *Agency*, Scope of employment.

It is not within the scope of the employment of the foreman of a teaming business to demonstrate in the stable to one of the employees the working of a gun which belonged to the foreman and which earlier in the day he had loaned to the proprietor of the teaming business for him to use in shooting a cat which had been stealing pigeons from the stable, and if, while the foreman is so demonstrating the working of the gun, it goes off and injures another employee, the proprietor of the stable is not liable for the negligence of the foreman.

If the proprietor of a teaming business, who has borrowed from his foreman a magazine gun loaded with more than one cartridge for the purpose of shooting a cat that had been stealing pigeons from his stable, leaves the gun in his office with a charge in it after he has used it, and the owner of the gun enters the office and takes the gun and, while he is demonstrating the gun's workings to a fellow employee, it goes off and injures another fellow employee, the injury to such employee cannot be said to have been caused by negligence on the part of the proprietor.

TORT for injuries received by the plaintiff while in the employ of the defendant, the proprietor of a teaming business, and alleged to have been caused by negligence of the defendant in caring for, or of his foreman in handling, a gun in the defendant's stable in Chelsea. Writ in the Superior Court for the county of Suffolk dated November 24, 1905.

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At the trial before *Bell*, J., the foreman, Wiley, who also was the defendant's grandson, testified that on the morning of the accident he had brought the gun to the stable with him, intending to take it to Cape Cod for duck shooting; that the defendant asked him to leave the gun with a loaded shell in the office, as the defendant "desired to shoot at a cat that was stealing pigeons from the barn"; that he left one shell with the defendant and placed the gun, unloaded, behind the desk in the office; that later in the day he talked with the defendant on the telephone and the defendant told him he had used the gun during the day and had shot the cat; that, returning to the stable in the evening, he picked up the gun to take it apart so as to take it away; that it had nothing but an empty shell in it; that he was showing it to one Johnson, a fellow employee, and had placed a loaded shell in it and had snapped the lock so as to eject the empty shell, and that, while he was doing so, his thumb, which was wet, slipped from the trigger and the loaded shell exploded, and the plaintiff was shot.

Johnson testified that Wiley showed him the gun and told him what kind of a gun it was; that Wiley "snapped the breach up and that threw the empty shell out and then snapped it up again and I couldn't say then what did happen, but heard the gun go off"; that he was in a position to see if Wiley put any shell in the gun, but that he did not see him do so; that he did not have to, as the witness understood that the gun "was one of those loaded from a magazine"; that, on the way to the hospital with him and the plaintiff, Wiley had said to him that he "didn't realize there was another shell in there loaded."

The presiding judge directed a verdict for the defendant, and the plaintiff alleged an exception.

J. E. McConnell, (*D. J. Maloney* with him,) for the plaintiff.

H. A. Eyges, for the defendant, was not called upon.

BRALEY, J. The plaintiff before he can recover must establish either that the defendant's foreman in discharging the gun acted within the scope of his employment, or that the defendant himself was negligent in leaving the loaded gun in his office. Upon the evidence neither proposition can be maintained. The defendant, who kept a livery stable, employed the owner of the gun as his foreman and driver, by whom, while exhibiting

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the gun to a friend, the cartridge was exploded. Beyond this general statement, and the fact that he gave orders to the teamsters, nothing further is stated as to the foreman's duties. It is manifest, that the defendant neither kept nor used the gun as an instrument in the prosecution of his business, and the act of the foreman in taking it apart was outside of any service either directly or incidentally connected with his employment. He was engaged in handling his property as an affair of his own. *Obertoni* v. *Boston & Maine Railroad*, 186 Mass. 481, 483, and cases cited. *Berry* v. *Boston Elevated Railway*, 188 Mass. 536. *Collins* v. *Wise*, 190 Mass. 206.

If, through the defendant's failure to take proper precautions to guard against a danger which he ought to have foreseen, the gun, while on the defendant's premises and in his custody, had been taken and accidently discharged by an intermeddler to the injury of the plaintiff, who was lawfully in the stable as an employee, a different question would be presented. *Lane* v. *Atlantic Works*, 107 Mass. 104. *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341, 344, and cases cited. It is true, that at his request the magazine gun had been left for the defendant's use, and, when the owner resumed possession after having been informed by him that it had been used for the purpose for which it had been borrowed, he very likely assumed that the cartridge had been exploded. But even then, the efficient cause of the plaintiff's injury was not the remote neglect, if any, of the defendant seasonably to give this information that the gun still remained charged, but the act of the owner, who was the wrongdoer, in deliberately taking the gun apart without first ascertaining whether it was in the same condition as when lent. *McDonald* v. *Snelling*, 14 Allen, 290. *Carter* v. *Towne*, 103 Mass. 507. *Glassey* v. *Worcester Consolidated Street Railway*, 185 Mass. 315. *Lebourdais* v. *Vitrified Wheel Co.*, *ubi supra*.

Exceptions overruled.

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TITUS E. EISNER *vs.* FRED B. HORTON & another.

Suffolk. December 7, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action against a contractor to recover for personal injuries, received by the plaintiff while employed by the defendant in the erection of a building of many stories of steel construction with granite walls, alleged in one count of the declaration under R. L. c. 106, § 71, cl. 2, to have been caused by the negligence of a superintendent of the defendant, and alleged in another count to have been caused by the negligence of the defendant in failing to furnish the plaintiff with a suitable place in which to work, it appeared that the tenth floor of the building had been laid in terra cotta, and that many planks had been placed thereon, resting on the iron beams and the terra cotta, chiefly for the protection of the floor but also for the support of stones being used in the construction of the walls of the next story of the building and for a convenient way for workmen to walk upon. A runway of planks was so constructed along the side of the wall, upon which the masons stood as they worked and along which the plaintiff and others passed in carrying stones to be placed upon the wall. All the planks were placed in position by the workmen as they were needed and were not fastened down. There were holes left in the terra cotta flooring between the beams for wires or pipes to be placed in. There was uncontradicted testimony by the plaintiff and others that this method of laying planks and leaving holes in the terra cotta was usual and proper. While carrying a stone along the runway with another workman whom he was following, the plaintiff stepped upon the end of a plank which did not rest upon a beam but was over a hole in the terra cotta, the end went down and the plaintiff fell and was injured. It did not appear how the end of the plank happened to be so placed, but the condition of the plank before the accident was obvious. The plaintiff had been accustomed to work upon buildings of this kind for six years. *Held*, that as a matter of law the plaintiff had assumed the risk of the injury; *also*, that there was no evidence of negligence of the defendant; and, *also*, that there was no evidence of negligence of the superintendent, since to require a constant inspection of the planks where they were placed over the holes would be imposing upon the builder an unreasonable responsibility.

TORT for personal injuries received by the plaintiff while employed by the defendants in the construction of a building, alleged in the first count of the declaration under R. L. c. 106, § 71, cl. 2, to have been due to the negligence of a superintendent, and alleged in the second count to have been due to negligence of the defendants in failing to furnish to the plaintiff a safe and suitable place in which to work. Writ in the Superior Court for the county of Suffolk dated December 19, 1906.

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The case was tried before *Wait*, J., who at the close of the plaintiff's evidence directed a verdict for the defendants. The plaintiff alleged exceptions. The facts are stated in the opinion.

G. P. Beckford, for the plaintiff.

W. H. Hitchcock, (*C. M. Pratt* with him,) for the defendants.

KNOWLTON, C. J. The plaintiff was working in the erection of a building of steel construction, with granite walls. The tenth floor had been laid in terra cotta, and it had upon it a large number of planks, resting upon the iron floor-beams and the terra cotta. They were put there chiefly for the protection of the floor from stones and other material, which they supported in large quantities, and which had been brought there for use in the construction of the next story of the building. From the approach by the elevator, in the centre of the building, there was a line of planks laid side by side to a point near the front of the building, which furnished a convenient way for the passage of men and the transportation of material, and adjacent to the front wall there was a similar line of planks on which the masons stood in laying the wall, and other men passed in moving stone and bricks and mortar to be used in the construction of the wall. The plaintiff testified that this runway was four planks in width, measuring out from the wall, while one of his witnesses said it was two or three planks wide. There were places in the terra cotta floor between the iron floor beams where openings had been left for pipes or wires to pass. The planks were put in place by the workmen as they were needed, and were laid upon the floor, without being fastened. There was uncontradicted testimony from the plaintiff and others, that this mode of using planks and of leaving openings in the terra cotta was a usual and proper mode of construction. There was no contention that the defendants failed to furnish a sufficient supply of suitable planks. As the plaintiff and one Garity were walking along the line of planks by the front wall, carrying a stone about three feet long, eighteen inches high, and from four to eight inches thick, Garity going in front, and holding one end of the stone up against his back, and the plaintiff going behind, holding the stone in front of him, one end of a plank on which the plaintiff stepped went down and his leg went through the floor, the stone fell, and the plaintiff fell and

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broke one of his fingers. The evidence tended to show that the end of the plank was left, or had slipped, so that it was not supported as it should have been by the terra cotta floor, and the weight upon it caused it to go down. The plaintiff's principal contention is that there was negligence of the superintendent in failing to discover this condition of the plank and to make it safe.

The planks were not there as a structure. They were for use by the workmen as needed for their convenience and the protection of the floor. This was a kind of use that might properly be intrusted to ordinary workmen. There were no serious dangers involved in the use of them by reason of an occasional small hole in the terra cotta floor. If workmen were reasonably careful in putting them down and in observing their condition afterwards, there was no such danger of an injury as called for systematic inspection. There was nothing to show whether this plank had been out of position for any considerable time before the accident. It seems probable that it had been slid a little at some time by an accident, or by the negligence of some workman. The plaintiff had been accustomed to work upon buildings of this kind for six or eight years, and he, or any other workman of experience, could see whether a plank over an opening was out of position, and could judge of the risk of such an accident as well as the superintendent could. To hold that it was the duty of a superintendent, under such circumstances, to go about the building in every place where a plank was over an opening and observe its position, with such frequency as to prevent the possibility of such an accident, would impose upon the builder an unreasonable responsibility.

We are of opinion that the risk from the use of planks in this way was one of the risks of the business which the plaintiff assumed when he entered the defendant's service; and that there was no evidence of negligence on the part of the defendants or their superintendent.

Exceptions overruled.

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SARAH E. R. WHITE *vs.* NEW YORK LIFE INSURANCE COMPANY.

Suffolk. December 7, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & SHELDON, JJ.

Insurance, Life.

The insured under a policy of life insurance, on which a premium of $125.25 was payable annually in advance, at the time when one of the premiums became due, instead of paying it, made a cash payment of $31.25 and gave a note for the balance of $94, payable in six months. The note stated that it was accepted by the insurance company at the request of the maker, together with $31.25 in cash, upon an express agreement there set forth, "that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made." The insured failed to pay the note at maturity, and thereafter died without having paid it. *Held*, that the assured was bound by the agreement contained in the note which he had signed and that accordingly the policy had become void on non-payment of the note at maturity.

CONTRACT on a policy of insurance issued by the defendant upon the life of Frank A. White, the plaintiff's husband, in which the plaintiff was named as the beneficiary. Writ dated June 2, 1908.

In the Superior Court the case was tried before *Harris*, J., without a jury. The facts shown by the evidence are stated in the opinion. The policy was issued on August 19, 1903, at which time the premium was paid in advance to August 19, 1904, and on the latter date the premium was paid up to August 19, 1905. The amount of the annual premium was $125.25. On August 19, 1905, the insured gave a note for the premium then due, called a lien note, which was secured by the policy, and paid the interest for one year in advance. On August 19, 1906, he paid the interest on this lien note up to August 19, 1907, and at the same time paid $31.25 in cash and gave a note for $94

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due on February 19, 1907. The cash then paid and the amount of the last named note equalled the amount of the premium due from August 19, 1906, to August 19, 1907. On July 12, 1907, the insured died, not having paid the notes above mentioned, which together with the cash payment of $31.25 and the interest on the lien note to August 19, 1907, were retained by the defendant. By the terms of the policy, the assured was entitled to eight months' term insurance after the lapsing of the policy for default in the payment of any premium.

The defendant contended that upon the failure of the assured to pay the note, Exhibit C, described in the opinion, on its due date, February 19, 1907, the policy lapsed as of August 19, 1906, charged with the amount of the lien note, and that the eight months' term insurance dated from August 19, 1906. The plaintiff contended that the policy lapsed on February 19, 1907, or on August 19, 1907, and that the eight months' term insurance dated from one of those times, and was in force when the insured died on July 12, 1907.

At the close of the evidence, the plaintiff asked the judge to make the following rulings:

1. On all the evidence the plaintiff is entitled to recover.

2. The policy in suit was in force at the date of the death of Frank A. White.

3. The result of the agreement of August 19, 1906, and the payment of the $31.25 was to hold the rights under the policy in abeyance until February 19, 1907, and upon the non-payment of the note due at the latter date, the policy lapsed as of February 19, 1907, and the assured then was entitled to the term insurance as provided in the policy, which kept it in force until October 15, 1907.

4. Unless the August 19, 1906, agreement will permit of no other reasonable interpretation, the court will not allow it to work a forfeiture of the policy, and it does permit of other reasonable interpretations.

5. The receipt by the defendant of interest on the lien note up to August 19, 1907, kept the policy in force up to that date.

The judge refused to make any of these rulings, except the first two clauses of the fourth. He found for the defendant; and the plaintiff alleged exceptions.

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R. Y. Fitzgerald, for the plaintiff.

W. A. Morse & F. J. Geogan, for the defendant, were not called upon.

KNOWLTON, C. J. All of the plaintiff's requests for rulings which were refused by the judge relate to the effect, upon the rights of the parties, of the agreement contained in Exhibit C, which was made on August 19, 1906. The premium upon the policy of insurance on the life of the plaintiff's husband was payable annually on August 19. The policy was issued on August 19, 1903, and the assured paid two annual premiums in cash. When the third premium became due, on August 19, 1905, he did not pay it in cash, but gave his note for the amount due, payable on August 19, 1906, and he paid the interest on it to that date. At the end of the year, on August 19, 1906, he did not pay the note, but paid interest on it in advance for another year. He did not pay the premium due on that date, and, if no other arrangement had been made, the policy by its terms would then have been finally forfeited for non-payment of the premium, subject to the right of the assured to have the benefit of the excess of the reserve credited to the policy above the indebtedness of the assured, which reserve would keep the policy in force for eight months longer, so that there could have been a recovery under it if the assured had died at any time before April 19, 1907, but not if he died afterward. His death occurred on July 12, 1907, and the question is whether the further arrangement, made on August 19, 1906, kept the policy in force until the time of his death.

This arrangement was a payment of $31.25 in cash, and the giving of a note for $94, due on February 19, 1907, which is Exhibit C. Included in the note was this agreement in writing: "This note is accepted by said company at the request of the maker, together with $31.25 in cash, on the following express agreement: That although no part of the premium due on the 19th day of August, 1906, under policy No. 3,476,346, issued by said company on the life of Frank A. White has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company

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as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any State in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms."

This agreement, signed by the assured, was binding upon him. The note was not paid, and for that reason, by virtue of the agreement, it ceased to be a claim against the maker. The $31.25 in cash was treated as a consideration for the privilege which the assured had enjoyed; and the rights of both parties in reference to the policy were precisely the same as if this note had never been given, and the payment in cash had never been made. It is impossible to make the agreement plainer than it is by the written language contained in the note. The policy ceased to be in effect after August 19, 1906, except as it was continued by the term insurance already referred to. This extended it for eight months and no more.

Other cases resembling this, in which a like decision was made, are the following: *Holly* v. *Metropolitan Ins. Co.* 105 N. Y. 437. *Baker* v. *Union Ins. Co.* 43 N. Y. 283. *Bank of Commerce* v. *New York Ins. Co.* 125 Ga. 552.

Exceptions overruled.

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HARRIET M. MILES *vs.* SAMUEL P. JANVRIN, administrator HERBERT S. MILES *vs.* SAME.

Suffolk. December 8, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Landlord and Tenant. Lord's Day. Contract, Validity. *Frauds, Statute of.*

In an action by a married woman against the owner of a house let by him to the plaintiff's husband, for personal injuries to the plaintiff caused by a defect in the steps leading to the house, if there is evidence upon which the jury can find that the defendant made a lawful contract with the plaintiff's husband to look after the condition of the steps and keep them safe, so that the plaintiff's husband and his family might use them confidently without the duty of examining them to see whether the wood was sound and strong, the case is for the jury and it is error to order a verdict for the defendant.

In an action by a married woman against the owner of a house let by him to the plaintiff's husband for personal injuries to the plaintiff caused by a defect in the steps leading to the house, it appeared that the principal conversation which resulted in the letting of the premises to the plaintiff's husband occurred on the Lord's day, that the defendant then promised the plaintiff and her husband that he would have the steps looked over and put in good repair, and would keep them so while they lived there, that the plaintiff's husband moved into the house in the following week, that, on the next day after the plaintiff went into the house to stay, the defendant came there and the plaintiff said to him that she saw he had done nothing about the steps yet, whereupon the defendant replied that he was going immediately to give directions to his son to "come down and look right after them," and that soon after the accident the defendant put in new steps. The defendant testified that he told his son to "be particular to keep them [the steps] safe so that no accident would occur." *Held*, that, although the first conversation alone could not have been proved under the statute of frauds, because it was a contract for a sale of an interest in land, and it also was void as a contract, because it was in violation of the statute for the observance of the Lord's day, yet, at the time of the later conversation, there was no question of the statute of frauds, because the tenancy had been created, and, as the conversation between the defendant and the plaintiff after she went to the house to live referred to a former conversation and was not intelligible without knowing what the former conversation was, the fact that the previous conversation was on the Lord's day did not make it incompetent for the purpose of explaining the later conversation and showing its meaning, and that the jury might find that, in connection with entering into the relation of landlord and tenant on a week day, the parties adopted the contract which they previously had attempted to make, and that there was evidence for the jury that the defendant had agreed to keep the steps in a safe condition.

TWO ACTIONS OF TORT, the first by a married woman for ersonal injuries received by her at about seven o'clock in the

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evening of October 17, 1903, from one of the steps leading to a house on Hillside Avenue in Revere, which her husband had hired from the defendant's intestate, giving way when the plaintiff stepped on it as she was going to take a car for Chelsea in company with her brother, and the second by the husband of the plaintiff in the first case for the loss of her services in consequence of her injuries. Writs dated December 19, 1904.

At the first trial of the first case in the Superior Court before *Bell*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were sustained in a decision of this court, reported in 196 Mass. 431. Afterwards both cases were tried together before *Crosby*, J., who in each of the cases ordered a verdict for the defendant. The plaintiffs alleged exceptions, raising the questions which are considered in the opinion.

J. A. McGeough, for the plaintiffs.

J. W. Ramsey, (*W. M. Robinson & J. F. Lynch* with him,) for the defendant.

KNOWLTON, C. J. There was evidence in this case which would warrant the jury in finding that the plaintiff was in the exercise of due care and that the defendant's intestate was negligent, if the relation of the parties in regard to the steps was such that the defendant owed the plaintiff a duty to look after their condition and provide for their safety during the term of occupation of the plaintiff's husband as a tenant. The steps were a part of the premises let. As a general rule a tenant takes the premises as he finds them, with no duty on the part of the landlord to repair them, or provide for their safety during the term. But if a landlord retains in his possession and control approaches, halls or passages, to be used in common by different tenants, or by himself and tenants, the law implies from these relations a duty on his part to keep them in a safe condition, except as to obvious risks from the mode of construction or other permanent conditions, of which the tenant takes the risk because impliedly there is to be no change in these particulars. In the former decision of this case it was held that a landlord and tenant may enter into relations in regard to a part of the premises let, such that the landlord assumes the duty of looking after their condition, and providing for their safety, for the pro-

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tection of the tenant. *Miles* v. *Janvrin*, 196 Mass. 431, 434, 435, 439. We believe this to be in accordance with the law as it is generally understood elsewhere. For a recent application of it in New York, see *May* v. *Ennis*, 78 App. Div. (N. Y.) 552. In such a case the question is not whether an important part of the landlord's undertaking is in form a promise to make repairs, but whether, as a result of the dealings of the parties with each other, they come into relations whereby the landlord undertakes and assumes the duty of looking after the condition of the premises in reference to safety, and of doing what is necessary for that purpose, so that the tenant properly may trust him for the performance of this duty. The control of the premises that the landlord retains in such cases is not a control that takes them out of the possession of the tenant as the owner of the estate at will or for years, but only a control so far as is necessary for making proper inspection and keeping them in a safe condition. The tenant could maintain trespass *quare clausum* against a stranger coming upon the premises, as well under such an arrangement as if the landlord made no repairs.

The difference between an agreement like that in *Tuttle* v. *Gilbert Manuf. Co.* 145 Mass. 169, or that of a landlord who agrees only to make general repairs during the term, and an agreement of a landlord who promises to take care of the property and keep it in a safe condition and in good repair during the term, is that the former is a simple contract to do certain work, and nothing more. If the landlord fails to do the work, it leaves him liable only for such damages as are the direct result of his breach of contract. This ordinarily would be only the cost of making the repairs. The tenant in such a case is not relieved of the duty of looking out for himself as to the safety of the premises, and refraining from using them if the use would be perilous by reason of the failure of the landlord to do the work. The latter is a contract which has reference directly to the condition of the premises as to safety, as well as in other particulars. The tenant may rely upon the undertaking in that particular, and assume that the premises will be kept safe for his use. Payment of damages for a personal injury resulting from a breach of such a contract would be directly in the contemplation of the parties in making the contract.

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Apart from the question how far the rights of the parties are affected by the fact that an important part of their conversation was on a Sunday, there was evidence from which the jury might find that the defendant undertook to look after the condition of the steps, and keep them safe, so that the plaintiff's husband and his family might use them confidently, without the duty of examining them to see that the wood was sound and strong.

We come now to that part of the defense which is founded on the Sunday law. The principal conversation in regard to the letting of the premises occurred on the Lord's day. It appeared in evidence that the defendant, who was in charge of the property for the intestate, said to the plaintiff and her husband: "You won't have anything to do with those steps, never mind about it. I will take care of them myself; I will have them looked over and put in good repair, and keep them so while you stay there." Other evidence upon the same subject was that he said: "You won't have to bother with them steps, I will keep them in my own care; I will look after them myself, I have a man for that purpose that lives on the same street, and I will have him to overhaul them steps and fix them, put them in good repair, and keep them so as long as you live there." It appeared that the plaintiff's husband moved into the house the following week.

The agreement between the parties, made at that time, was not binding, for two reasons. In the first place it was a contract for the sale of an interest in land, and was within the statute of frauds. Secondly, it was illegal because it was in violation of the statute for the observance of the Lord's day. As an illegal contract it could not be ratified, so as to be in effect from the beginning; but it could be adopted subsequently without formality. See *Stebbins* v. *Peck*, 8 Gray, 553, as explained in *Day* v. *McAllister*, 15 Gray, 433. The plaintiff's husband and the plaintiff first came into the relation of contracting parties when the husband entered upon the tenancy, under the authority which had been given him on the Sunday previously, and the defendant accepted him as a tenant. What were the relations of the parties in reference to the premises? There was evidence that, the next day after the plaintiff

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went into the house to stay, the defendant came there, and she said to him, "I see they haven't done anything to the posts or steps yet," and that he replied, "I am going right up to my son's now, and tell him about them and have him come down and look right after them." She also testified that afterwards, when she saw the defendant's son George at one time, she said to him: "I see you haven't done anything to those steps yet"; and he said, "Well, I will, when I get around to them." It appeared that soon after the accident the defendant put in new steps. The defendant testified that he told his son to "be particular to keep them [the steps] safe so that no accident would occur." The conversation between the plaintiff and the defendant, after she went to the house to live, by its very terms referred to a former conversation. It is not fully intelligible without knowledge of what the former conversation was. The fact that their previous talk was on a Sunday does not make it incompetent for the purpose of explaining the later conversation and showing its meaning. *Dickinson* v. *Richmond*, 97 Mass. 45. We are of opinion that, from all this evidence, the jury might find that, in connection with entering into the relation of landlord and tenant on a week day, the parties adopted the contract which they previously had attempted to make in regard to the tenancy, but which was of no effect because it was made on the Lord's day. *Day* v. *McAllister*, 15 Gray, 433, 434. *Stebbins* v. *Peck*, 8 Gray, 553. Upon the contract arising from the creation of the tenancy there was no question as to the statute of frauds. This evidence tends to show an understanding on the part of both parties that the defendant was to keep the steps in a safe condition.

Exceptions sustained.

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CLARK POWERS *vs.* MALCOLM E. STURTEVANT.

Suffolk. December 8, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Application for rehearing before full court. *Judgment*, Entry of. *Superior Court. Supreme Judicial Court.*

A judge of the Superior Court in the exercise of his discretion may order judgment to be entered in accordance with a rescript issued by this court, although an application for a rehearing on account of a supposed error of law in the decision of the case by the full court has been sent to the Chief Justice of this court and the receipt of it has been acknowledged with a statement that it will be considered by the justices at their next meeting for consultation, the time for which has not arrived.

If, after the receipt of an application for a rehearing in a case which has been decided by this court, the justices do not recall the rescript or otherwise suggest a postponement of action by the lower court, the action of that court should be governed by the rule stated in *Shannon* v. *Shannon*, 10 Allen, 249, which leaves the question of postponing the entering of judgment for the purpose of affording the unsuccessful party an opportunity for a re-argument before this court to be determined by the trial judge in the exercise of his discretion, and his refusal of an application for such a postponement furnishes no ground for exception.

KNOWLTON, C. J. This is an appeal by the defendant from an order of the Superior Court that judgment be entered for the plaintiff. The appeal is founded upon the fact that an application for a rehearing, on account of a supposed error in law in the decision of the case by the full court, had been sent to the Chief Justice, and the receipt of it had been acknowledged, with a statement that it would be considered by the justices at their next meeting for consultation. The application was sent in July, and the next meeting of the justices was to be on the first Tuesday of September.

The defendant seemingly misapprehends the standing of a case after a final decision of it by the full court upon questions of law. On this subject Chief Justice Gray said, in the opinion in *Winchester* v. *Winchester*, 121 Mass. 127, 129, "The practice of that court [the English Court of Chancery] affords no rule to govern a court of last appeal, whose judgments have the strongest presumption in their favor, and cannot be freely reconsidered

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without unreasonably protracting litigation and disregarding the claims of other suitors to the attention of the court.

"After final judgment in the House of Lords, or in the Judicial Committee of the Privy Council, no rehearing is allowed, unless for the purpose of correcting mistakes in the form of the decree. . . . In the Supreme Court of the United States, no rehearing of a case once decided is granted, nor even an argument permitted upon the question whether a rehearing should be had, unless the court, upon inspection of the petition for a rehearing, sees fit so to order. . . . And this court, for some years past, has conformed to that practice, as essential to the discharge of its increasing business." He supports his statements as to the practice in England and in the Supreme Court of the United States by numerous citations. A similar practice prevails generally in the courts of last resort in the States of this country, although there are two or three, and possibly more, in which applications for a rehearing of questions of law are entertained and arguments heard upon them. The application in *Winchester* v. *Winchester*, *ubi supra*, was on the ground that a decree had been entered erroneously as by consent of the parties, when in fact there was no consent. The court received the application without hearing argument upon it, and announced a decision refusing a rehearing. In cases of applications for a rehearing on the ground of a supposed error of the full court, it has been the practice, for many years, not to treat them as having any standing as a part of the legal procedure in the case. They are not recognized by our statutes. They cannot be made as a matter of right, and they are not entered upon the records of the court unless the justices, in their discretion, think they ought to be.

Of course there is a possibility of error in a decision by the most learned and painstaking court in the world. The justices of the Supreme Court of the United States, and of other distinguished tribunals, are often nearly evenly divided in opinion upon a difficult question of law. But when a decision is made, after a court's best efforts to reach a correct conclusion, it ought not to be open to revision merely because it seems to the defeated party to be wrong. On the other hand, if by any accident, oversight or inadvertence a wrong conclusion should be reached in any case, the judges who made the decision presum-

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ably would be more desirous than any one else to correct the error. Accordingly, in such a case they would welcome a suggestion in the interest of justice, from anybody, at any time while they have power to revise the decision. The practice of the court in reference to such suggestions from a party is stated in *Wall* v. *Old Colony Trust Co.* 177 Mass. 275, 278, as follows: "Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error, which in the opinion of the justices should call for correction or re-argument. Argument is not heard upon such an application, nor should the application itself contain any argument, but it should suggest the error relied on." If such a suggestion indicates an error, the court, of its own motion, will do anything in its power to accomplish justice and protect the rights of the parties. But happily there is seldom occasion to do anything of this kind, and it would be likely to work injustice rather than justice, to permit a party, by presenting such an application, to postpone as of right the entry of final judgment, after a case has been through all the earlier stages of litigation, and has been finally decided with due deliberation by the court of last resort. If the justices, after receiving such an application, do not recall the rescript, or otherwise suggest a postponement of action by the lower court, the action of that court should be governed by the rule stated in *Shannon* v. *Shannon*, 10 Allen, 249, in these words: "The application to the court holden by a single judge, to postpone entering a judgment, for the purpose of affording the party an opportunity for a re-argument upon a case already decided by the full court, was a matter within the discretion of the judge, and his ruling refusing such application does not furnish any ground for a bill of exceptions." On the face of the record the case was ripe for judgment, and there was no error of law in making the order.

Judgment affirmed.

W. Keyes, for the defendant.

S. L. Whipple, *W. R. Sears & H. W. Ogden*, for the plaintiff, submitted a brief.

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MICHAEL DOHERTY *vs.* EDWARD S. BOOTH.

Suffolk. December 9, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Evidence*, Opinion: experts.

The common law rule, that where a master has provided a sufficient supply of proper temporary appliances for the use of his servants he is not liable for an injury to one of his servants caused by the choice of a defective appliance by another of them, has no application to an action under R. L. c. 106, § 71, by a workman against his employer for injuries caused by the choice or use of a defective appliance by one intrusted with and exercising superintendence.

A stevedore is liable for personal injuries sustained by a longshoreman in his employ by reason of the falling of a staging, when it was being lowered from the side of a ship under the direction of his superintendent, owing to the breaking of one of the rope slings by which the staging was suspended, if the accident was caused either by the employer's furnishing a defective rope, or by a rope which was sound when furnished having become defective by age or wear under such circumstances that the employer by the exercise of reasonable diligence would have known its condition.

In an action for personal injuries caused by the breaking of a rope, if the plaintiff shows that the rope when in good condition was of ample strength to have sustained the load which was upon it at the time it broke, and nothing further appears in regard to the condition of the rope, the jury from their common experience can find that the accident would not have happened unless the rope in some way had become unsound.

In an action by a longshoreman against a stevedore by whom he was employed, for personal injuries caused by the falling of a staging which was being lowered from the side of a ship where it had been hoisted into position about five hours earlier, it appeared that the work of placing the staging in position on the ship and of removing it at the end of the day was done under the personal supervision of one who could have been found to have been acting as a superintendent of the defendant, that the falling of the staging was due to the breaking of one of the rope slings by which it was suspended while being lowered, that, after the staging had been hoisted into place five hours earlier, this rope was unhooked from the falls and was left hanging between the side of the ship and the staging in such a way that as the ship rose and fell with the tide the staging would move or chafe on the ship and the rope would be worn, and that the appearance of the rope immediately after the breaking was described as torn or unravelled with each strand longer than the other and as ragged and "kind of burned." It further appeared that the rope was an inch and a half thick, and when in proper condition was of ample strength to have sustained the load. Evidence was offered by the plaintiff to show that the superintendent made no examination of the rope before directing or permitting its use in lowering the staging. This evidence was excluded by the presiding judge, who ordered a verdict for the defendant. *Held*, that it was a question for the jury whether the defendant's superintendent by using reasonable care should have known from inspec-

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tion that the sling either was unsuitable when first used or had become weakened by chafing to such an extent as to be unsafe, and that, if the superintendent should have had such knowledge, his failure to take proper precautions which might have averted the accident was evidence of negligence in superintendence for which the defendant would be liable. *Held, also,* that the evidence that the superintendent made no examination of the sling before directing or permitting its use was plainly admissible and its exclusion was erroneous.

In an action by a longshoreman against a stevedore by whom he was employed for personal injuries, caused by the falling of a staging when being lowered from the side of a ship, upon which it had been hoisted into place five hours earlier, by reason of the breaking of one of the rope slings by which it was suspended while being lowered, where the plaintiff contends that the rope when in proper condition was of ample strength to have sustained the load, and that it was weakened so as to be made unsafe by being chafed between the side of the ship and the staging by the oscillation of the ship as she rose and fell with the tide, the weakening effect upon the rope of the chafing caused by the movement of the ship and also the fact that a physical examination of the rope would have shown the wear caused by its former use are matters of common knowledge on which the opinion of experts is not admissible, but the opinion of experts is competent to show what strain or load a rope of the diameter of that which broke would carry ordinarily when in good condition.

TORT, against a stevedore, at common law and under R. L. c. 106, § 71, for personal injuries received by the plaintiff on August 24, 1904, while in the employ of the defendant as a longshoreman and working on the dock at Pier 6 in that part of Boston known as East Boston, the first count, at common law, alleging that the defendant negligently furnished improper and unsafe tools and appliances for the plaintiff to work with, the second count, under the statute, alleging a defect in the ways, works or machinery of the defendant, and the third count, under the statute, alleging negligence on the part of the defendant's superintendent. Writ dated September 29, 1904.

At the trial in the Superior Court before *Dana*, J., it appeared that the plaintiff had been a longshoreman for eleven years, and that his injury was occasioned by the falling of a staging which was being removed from the steamship Canadian to the pier, that the plaintiff with others was prying up the shore end of the staging with a truck, when the rope by which the staging was being lifted broke, letting it fall and knocking the truck against the plaintiff; that one Sloan got the rope from a pile of ropes called cargo slings which the defendant kept in a room on the wharf which was in charge of the defendant's gear keeper; that the rope had been used on that day to raise the staging upon the

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vessel, and that the accident happened about six P. M. Other facts are stated in the opinion.

At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. F. R. Dolan, (*T. R. Bateman* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

BRALEY, J. While on the wharf holding one of the trucks upon which it was to be received and wheeled away, the plaintiff was injured by the fall of a staging as it was being lowered from the ship's side, owing to the parting of one of the slings by which it had been suspended. It is not contended that he was careless, and the only question is, whether there was any evidence for the jury of the defendant's negligence. It is the defendant's first contention, that, having provided a supply of suitable slings, he is not responsible, if the plaintiff's fellow servant, having been sent by the foreman to get eight slings, selected among others the one which broke, even if after they had been brought the foreman without examination directed or permitted it to be used. The common law rule, that where the master has provided a sufficient supply of proper temporary appliances from which his servants may make a selection to replace those which have become unsuitable, if a choice is made of a defective appliance whereby one of their number is injured, the master is not liable for the negligence of a fellow servant, is not under R. L. c. 106, § 71, applicable to a person intrusted by the master with superintendence. One of the purposes of the enactment of the statute was to take this defense away. The sling which broke, however, was an appliance furnished by the defendant to be used in his business, and must be considered either at common law or under the statute not a temporary makeshift devised by the men to aid them in the performance of their work, but as a part of the permanent instrumentalities which the defendant had provided for his employees. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. *Donahue* v. *Buck*, 197 Mass. 550. Accordingly, neither under the count at common law, nor under the statutory count for defective ways, works or machinery, was the defendant exonerated, if it could have been found that originally he had furnished a defective sling, or that, having provided a sound sling, it had become so weakened by age and wear as to be defective,

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if by the exercise of reasonable diligence he ought to have known of its condition. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143.

Nor should a verdict for the defendant have been ordered under the third count, if there was evidence that Taft, whom the jury could find to have acted as superintendent, knew or ought to have known of a defective condition of the sling after it had been brought, and before it was put in use, or, if it was sound then, ought to have known that it had become weakened and unsafe at the time of the accident. *McKinnon* v. *Norcross*, 148 Mass. 533. *Coleman* v. *Mechanics' Iron Foundry Co.* 168 Mass. 254. *Donahue* v. *Buck*, 197 Mass. 550. *Ford* v. *Eastern Bridge & Structural Co.* 193 Mass. 89. *Cushing* v. *Smith Iron Co.* 194 Mass. 310. *Morena* v. *Winston*, 194 Mass. 378. The rope is described as an inch and a half thick, and all the witnesses agreed that, if in proper condition, it was of ample tensile strength to have sustained the load. If it parted when subjected to the ordinary strain for which it was designed, and nothing further appeared, the jury from their common experience could find that this would not have happened unless the rope in some way had become unsound. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143, 147. *Graham* v. *Badger*, 164 Mass. 42. *Ryan* v. *Fall River Iron Works Co.* 200 Mass. 188, 192, and cases cited.

The placing of the stage in position on the ship and its removal were under the personal supervision of the acting superintendent. In the adjustment of the stage, a cleat on the under side held that end on the inside of the rail of the ship. After using the sling at one o'clock to hoist the stage into position, it was unhooked from the falls, unrove, and, as described by the witnesses, while the ends were thrown back on the deck, the rest of the rope was left hanging between the side of the ship and the ship's rail underneath the stage, where it remained caught between the cleat and the rail, until lowered at six o'clock. During this time the ship rose and fell with the tide, and the oscillation caused the stage to move, or chafe on the vessel and the rail. The appearance of the rope immediately after breaking was variously described as torn or unravelled, with each strand longer than the other, and as ragged and "kind of burned." The negligence of a superintendent under such cir-

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cumstances may consist in a failure to take such precautions as a reasonably prudent man would take before subjecting himself or his employee to the chance of injury from imperfect or insecure appliances, as well as in giving improper orders or directing the performance of work under unsafe conditions. In the discharge of his duty it was for the jury to say, whether by using reasonable care he should have known from inspection, when the sling was used, that it was unsuitable, or should have known, when he directed that the staging should be taken down, that the sling had become weakened by chafing to such an extent as to be unsafe. If they so found, then his failure to take these precautions, which might have averted the accident, was evidence of negligence in superintendence, for which the defendant would be responsible. *Crowley* v. *Cutting*, 165 Mass. 436. *Reynolds* v. *Barnard*, 168 Mass. 226. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. *Donahue* v. *Buck*, 197 Mass. 550. *Connolly* v. *Booth*, 198 Mass. 577. The verdict directed for the defendant must be set aside, and a new trial ordered.

There remain the exceptions to the exclusion of evidence. If the lack of inspection could have been found to constitute negligence, evidence that the superintendent made no examination of the sling before directing or permitting its use was plainly admissible, and its exclusion was erroneous. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. The weakening effect upon the rope of the chafing caused by the movement of the ship, and the fact that a physical examination would have shown the wear caused by former use, were within the common knowledge of the jury without the aid of experts, but opinion evidence as to what strain or load a rope of like diameter would ordinarily carry was clearly competent, and should have been admitted. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131.

Exceptions sustained.

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AGNES CARROLL *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 10, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Interrogatories, Qualification of expert, Conduct of trial. *Interrogatories. Negligence, Res ipsa loquitur,* Street railway. *Street Railway. Evidence,* Opinion: experts, Presumptions and burden of proof. *Carrier,* Of passengers.

In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car of the defendant in which the plaintiff was a passenger, the plaintiff filed interrogatories under R. L. c. 173, § 61, addressed to the president of the defendant, containing the following question: "State whether or not the defendant company made an investigation as to the cause of said accident, and if your answer be 'Yes,' state what facts were discovered as a result of said investigation." The president answered as follows: "The defendant company investigated the accident referred to in the declaration in this case, but declines to state the result of its investigations, on the ground that in so doing it would disclose its evidence and the manner in which it proposes to prove its case." *Held,* that under R. L. c. 173, § 63, the answer was a proper one, and that a motion of the plaintiff that the defendant's president should be ordered to answer the interrogatory further should be denied.

The exclusion of the testimony of a witness, offered as that of a medical expert, on the ground that the witness has not had sufficient medical experience to qualify him as such an expert, is a matter within the discretion of the presiding judge.

In an action for personal injuries alleged to have been caused by the defendant's negligence, the exclusion of evidence offered by the plaintiff upon the question of damages is made immaterial by a verdict for the defendant on the issue of negligence.

The exclusion of a letter, written by a person who has testified as a witness for the opposing party, which is offered to show his bias against the party offering the letter in evidence, but which contains only by remote inference, if at all, any possible allusion to the party offering it in evidence, is a matter within the discretion of the presiding judge.

In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car of the defendant in which the plaintiff was a passenger, alleged to have been due to a broken and defective switch, the defendant, without objection or exception on the part of the plaintiff, put a hypothetical question to an expert asking for his opinion as to the causes by which the car might have been derailed, the defendant previously having laid a proper foundation upon which to rest the assumption of facts in the question. The witness assumed in his answer, in accordance with the assumption in the question, that the car track and the switch at which the car partially left the track were apparently in good condition as well after as before the accident, and then proceeded to give his opinion that, if these conditions were found to have existed at the time, the tongue of the switch might have been moved a little when the forward trucks passed over, and that, if this occurred, the rear trucks as they followed might be caught, causing the car partially to leave the track. In fur-

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ther explanation of the way in which such an accident might happen, he stated that, if dirt had worked into the switch, the tongue might have been pushed out from the rail on which the car was travelling, causing it to run off the track, or, if the switch tongue had become slightly worn, that it would be a little low, causing the tread of the wheel to lift from the rail as it passed over. The plaintiff asked the judge to exclude the answer on the ground that it assumed the existence of facts not in evidence which the jury fairly could not find to have been true. The judge refused to exclude the answer. *Held*, that the refusal was right; that the possibilities testified to by the expert might be regarded either as additional reasons for his opinion derived from experience or as other possible consistent explanations of the cause of the accident falling within the scope of the inquiry.

A presiding judge properly may refuse to single out a portion of the evidence for comment, although the comment requested may be a correct one.

A common carrier of passengers is required to exercise toward them only the highest degree of care which is consistent with the transaction of its business, and a street railway corporation is not to be held liable for an accident caused to one of its passengers by a defect in a switch merely because greater care in the examination of the condition of the switch would have prevented the accident, if the corporation exercised as much care in examining the switch as was consistent with the practical operation of its railway.

In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car in which the plaintiff was a passenger, alleged to have been due to a broken and defective switch, the plaintiff, after showing that he was in the exercise of due care, can establish a *prima facie* case by proving the derailment, but the defendant can rebut this presumption of fact by showing that it was not negligent, and the burden of proving the defendant's negligence remains upon the plaintiff as before. If the defendant introduces evidence from which the jury can find that it used due care in the construction, equipment and maintenance of its railway, this is sufficient to warrant a verdict in its favor without its accounting for the accident.

TORT for personal injuries incurred on October 21, 1905, in consequence of the derailment of a car of the defendant in which the plaintiff was being transported as a passenger, alleged to have been due to a broken and defective switch at the corner of Washington Street and Bowdoin Street in that part of Boston called Dorchester, which had been allowed to remain in a defective and dangerous condition by reason of the negligence of the defendant. Writ dated October 26, 1905.

Before the trial, interrogatories were propounded to the president of the defendant. The eleventh interrogatory was as follows: "Int. 11. State whether or not the defendant company made an investigation as to the cause of said accident and if your answer be 'Yes' state what facts were discovered as a result of said investigation." The answer of the defendant's president to this interrogatory was as follows: "The defendant

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company investigated the accident referred to in the declaration in this case but declines to state the result of its investigations on the ground that in so doing it would disclose its evidence and the manner in which it proposes to prove its case." The plaintiff made a motion in the Superior Court that the defendant be ordered to answer further the plaintiff's interrogatories. A judge of that court made an order that the defendant need not answer the eleventh interrogatory. From this interlocutory order the plaintiff appealed.

Later the case was tried before *Harris*, J. The evidence tended to show the following facts: On October 21, 1905, the plaintiff and her daughters, Catherine and Frances, were passengers in a box car of the defendant on Washington Street in that part of Boston called Dorchester, travelling in town in a northerly direction. Approaching Bowdoin Street, which runs easterly at nearly a right angle with Washington Street, there is a fall in the grade for about five hundred yards at the rate of from one and a half per cent to three per cent. There is a slight curve in the tracks to the left at this point.

There is a switch in the right hand or easterly rail of the inbound line at the corner of Bowdoin Street and Washington Street, which at that time was operated by hand. The tongue of this switch was kept in place by a key or flat piece of iron two inches wide by about three inches long and one half an inch thick, and the switch was ordinarily kept "keyed for Washington Street," that is, so as to allow the cars to proceed along Washington Street, as cars passed down Bowdoin Street infrequently, and the switch was so keyed at the time of the accident.

It was not in dispute that the car "coasted," that is, was allowed to run down grade without power, approaching the switch, but the distance that it coasted and the speed at which the switch was approached were in dispute.

It appeared that the wheels of the front truck took the switch properly, but the rear wheels jumped the switch. The evidence was conflicting, whether, after jumping the switch, the wheels remained upon the rails, the plaintiff's evidence tending to show that the car bumped some distance upon the pavement, while that offered by the defendant tended to show that, although the switch was jumped, the front wheels were upon the Washington

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Street rails and the rear wheels upon the Bowdoin Street rails when the car stopped. It was not in dispute that the car was then turned at an angle of about forty-five degrees from the Washington Street rails.

After the passengers had left the car, it was replaced by jacks, and, upon being started over the switch, again jumped it.

The answer of the expert, called by the defendant, described in the opinion, which the judge refused to exclude upon the request of the plaintiff, was in answer to the following hypothetical question, to which no objection was made and no exception was taken:

"Assuming on October 21, 1905, there was a switch, of this construction, that has been described, at the corner of Bowdoin and Washington Streets; that it had been keyed for Washington Street — in other words, the car was supposed to go directly north in town — and that a car of this pattern, 1094, that you have described to the jury, was proceeding along over this switch, and that it did straddle, as the witnesses have described; and assuming also that the switch was in good condition and that the car was in good condition, is there, by reason of your experience and study, any explanation you can give to the jury of the cause of that accident?"

At the close of the evidence the plaintiff asked the judge for twelve instructions to the jury, of which the judge gave the second, third, fifth, eighth and ninth. The others were as follows:

"1. Upon all the evidence the jury should find for the plaintiff."

"4. Upon all the evidence the jury should find that the defendant's negligence was the cause of the accident."

"6. While the burden of proof of the defendant's negligence is upon the plaintiff in this case, the proof of the occurrence of the accident in this case, and of the exercise of due care on the part of the plaintiff is *prima facie* proof of the defendant's negligence.

"7. A railway and its cars are so constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off the track or jumps a switch is evidence of defect or negligence somewhere; and when the track and cars are under the exclusive control of the defendant, it is evidence sufficient to

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charge it, in the absence of an explanation which satisfies the jury, that the accident was not due to negligence in some respect on the part of the defendant."

"10. The jury are not bound to believe the evidence of the defense or to accept the explanation of the accident offered by it unless they are satisfied that it is true and that the accident was not in fact due to the negligence of the defendant in any particular.

"11. The defendant was bound to use the highest degree of care for the safety of its passengers consistent with the practical operation of the railway, and if the jury find that the accident would not have resulted had greater care been taken to examine the condition of the switch and the position of the tongue and key of the same, the plaintiff is entitled to recover.

"12. The fact that the car again jumped the switch upon being replaced after the accident is evidence of a defect in the car or switch."

The judge refused to give in the form requested any of the instructions quoted above, and submitted the case to the jury with other instructions. In the course of his charge the judge gave the following instruction:

"Upon the question of negligence I think I have already stated to you times enough so that you have in mind the rule that, as between the passenger of a common carrier and the common carrier itself, the carrier is held to the rule of the highest care which is at the same time consistent with the practical carrying on of its business as a common carrier. That is to say, the amount of care required is not such a degree of caution as would defeat the purposes for which its vehicles and tracks and things were provided, that is, the frequent and rapid and easy transportation of passengers."

At the close of the charge the counsel for the plaintiff called the attention of the judge to the seventh instruction requested by him as quoted above. The judge read the request to the jury, and then instructed them as follows:

"I think I have covered that, but I will restate it a little.

"In the case of an accident on a railroad train or street car or steamboat, or any other public vehicle of transportation — but take the steam car or trolley car — if it is alleged that a car

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leaves the track, and a plaintiff comes into court and says, 'I was a passenger upon that car, and it left the track, and I was injured,' and there is no other evidence in the case in regard to the accident, the happening of such a thing as that, unexplained, would be *prima facie* evidence that something was wrong, and a jury might be warranted upon that in finding that it left the track by reason of negligence.

"But where there is evidence offered to explain the happening for the purpose of showing that it did not happen by reason of negligence, but that it happened either naturally or by reason of some accident which could not have been foreseen and prevented, then the mere derailment or unusual action of the car is not sufficient to justify the jury in finding negligence, from the mere fact that the car left the track. But the jury have got to take all the evidence — first, the plaintiff's description of the happening, then the defendant's description and its explanation — and out of all the evidence presented by both parties they have got to say, before they can find a verdict against the defendant, that all the evidence satisfies them by a fair preponderance that negligence and negligence only is the explanation.

"So that in this case, the explanation having been offered, it becomes not a question of presumption from mere *prima facie* evidence but it becomes a question to be determined by the weight of evidence upon all the evidence presented, the burden being upon the plaintiff to satisfy you that all the evidence shows and shows fairly, that the accident came about only by negligence."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

W. P. Murray, for the plaintiff.

R. A. Stewart & H. J. Hart, for the defendant.

BRALEY, J. The refusal of the president to answer the eleventh interrogatory affords no ground of appeal. The defendant was not compelled under R. L. c. 173, § 63, to disclose in advance its theory of the accident, or to state the facts derived from investigation, upon which it relied to establish its defense. *Gunn* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 417. *Robbins* v. *Brockton Street Railway*, 180 Mass. 51. *Spinney* v. *Boston Elevated Railway*, 188 Mass. 30.

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Nor was there any error at the trial in the rulings upon the admission and exclusion of evidence. It was within the discretion of the presiding judge, which does not appear to have been wrongly exercised, to exclude the testimony of the plaintiff's medical expert, upon the ground, that in his opinion the witness lacked sufficient medical experience. *Muskeget Island Club* v. *Nantucket*, 185 Mass. 303. *Lakeside Manuf. Co.* v. *Worcester*, 186 Mass. 552. Moreover, as his evidence if admitted bore only on the measure of damages, the jury having found on the issue of negligence that there was no liability, the plaintiff was not prejudiced. The exclusion of the letter also was discretionary, as it contains only by remote inference, if at all, any possible allusion to the plaintiff.* *Jennings* v. *Rooney*, 183 Mass. 577. *Robinson* v. *Old Colony Street Railway*, 189 Mass. 594. The defendant, without objection or exception, having put a hypothetical question to an expert called by it to give his opinion as to the causes by which the car might have been derailed, the plaintiff asked that his answer be excluded, because it assumed the existence of facts not in evidence, and which the jury could not fairly find to have been true. To a refusal to exclude this answer the plaintiff excepted. *Williams* v. *Clarke*, 182 Mass. 316. A hypothetical question rests upon either assumed facts already in evidence, or assumed facts which may be put in evidence. In determining the scope, fulness and distinctness of the questions, much must be left to the discretion of the presiding judge, which ought not to be overridden, unless it very clearly appears to have been wrongly exercised. *Chalmers* v. *Whitmore Manuf. Co.* 164 Mass. 532, 533. *Anderson* v. *Albertstamm*, 176 Mass. 87. *Commonwealth* v. *Johnson*, 188 Mass. 382, 384, 385, 386. By the testimony of other witnesses the defendant had laid a proper foundation upon which to rest the assumption of facts in the question asked. The witness assumed in his answer, as the question itself was predicated upon such assumption, that the car track and the switch were apparently in good condition as well after as before the accident, and then proceeded to give his opinion, that, if these conditions were found to have existed at

* The plaintiff contended that the letter showed bias against the plaintiff on the part of the writer who had testified as a witness for the defendant.

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the time, the tongue or the switch might have been moved a little when the forward trucks passed over, and, if this occurred, the rear trucks as they followed might be caught, causing the car partially to leave the track. In further demonstrating how this might happen, his statements, that if dirt had worked into the switch, the tongue might have been pushed out from the rail on which the car was travelling, causing it to run off the track, or, if the switch tongue had become slightly worn, it would be a little low, causing the tread of the wheel to lift from the rail as it passed over, may be regarded either as additional reasons for his opinion, derived from experience, or as other possible consistent explanations, falling within the scope of the inquiry.

We pass to the rulings requested by the plaintiff, and to the instructions under which the case went to the jury. In all there were twelve requests. Of these, the second, third, fifth, eighth and ninth were given substantially in the language requested, while the seventh, subject to the plaintiff's exception, was given in a modified form. The tenth was properly refused, as the judge was not called upon to single out a portion of the evidence for comment. Besides, the jury must clearly have understood from the instructions, which if not in terms certainly in substance embodied the request, that the credibility of the witnesses, and the weight of the evidence as to any adequate explanation offered by the defendant, were all for their determination. The twelfth also was properly refused for the first reason given above for the refusal of the tenth. By the first part of the eleventh request, the plaintiff directed the attention of the judge to the degree of care required of a common carrier of passengers, and the instructions were in conformity therewith. The second part could not properly be given as it subjected the defendant to a greater liability than the law imposes. *Millmore* v. *Boston Elevated Railway*, 194 Mass. 323. *Marshall* v. *Boston & Worcester Street Railway*, 195 Mass. 284, 287.

But the plaintiff's principal complaint arises from the refusal to give the sixth and seventh requests, without modification. In the case of *Ware* v. *Gay*, 11 Pick. 106, 112, where a stage coach, in which the plaintiff was a passenger, overturned and broke his leg, it was said, "The wheel came off upon a plain and good

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level road, without coming in contact with any other object. This evidence made a *prima facie* case for the plaintiff. . . . We are of the opinion that the law would imply negligence from those facts. It would result from them, that the coach was not properly fitted and provided. Then the burden of proof would change, and it would be for the defendants to rebut that legal inference." This form of statement of the law both as to the presumption of negligence on the part of the carrier, where the injury to the passenger is of such a nature, that the accident according to common experience would not have happened if there had not been a defect in the road or the equipment by which it is operated, and the burden of proof after a *prima facie* case has been made out, is found in very many of the cases where the subject has been considered. *Fairchild* v. *California Stage Co.* 13 Cal. 599. *Osgood* v. *Los Angeles Traction Co.* 137 Cal. 280. *Derwort* v. *Loomer*, 21 Conn. 245. *Yonge* v. *Kinney*, 28 Ga. 111. *New York, Chicago & St. Louis Railroad* v. *Blumenthal*, 160 Ill. 40. *Pittsburgh, Cincinnati & St. Louis Railroad* v. *Williams*, 74 Ind. 462. *Southern Kansas Railroad* v. *Walsh*, 45 Kans. 653, 659. *Louisville & Portland Railroad* v. *Smith*, 2 Duv. (Ky.) 556. *Baltimore & Ohio Railroad* v. *Worthington*, 21 Md. 275. *Stevens* v. *E. & N. A. Railroad*, 66 Maine, 74, 77. *Stoody* v. *Detroit, Grand Rapids & Western Railroad*, 124 Mich. 420. *McLean* v. *Burbank*, 11 Minn. 277. *Sawyer* v. *Hannibal & St. Joseph Railroad*, 37 Mo. 240. *Curtis* v. *Rochester & Syracuse Railroad*, 18 N. Y. 534. *Caldwell* v. *New Jersey Steamboat Co.* 47 N. Y. 282. *Iron Railroad* v. *Mowery*, 36 Ohio St. 418, 422. *Sullivan* v. *Philadelphia & Reading Railroad*, 30 Penn. St. 234. *Boss* v. *Providence & Worcester Railroad*, 15 R. I. 149, 154. *Zemp* v. *Wilmington & Manchester Railroad*, 9 Rich. (S. C.) 84. *Baltimore & Ohio Railroad* v. *Wrightman*, 29 Gratt. 431. *Stokes* v. *Saltonstall*, 13 Pet. 181. *New Jersey Railroad* v. *Pollard*, 22 Wall. 341. *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435. *Skinner* v. *London, Brighton & South Coast Railroad*, 5 Exch. 787. *Dawson* v. *Manchester, Sheffield & Lincolnshire Railway*, 7 H. & N. 1037. *Carpue* v. *London & Brighton Railway*, 5 Q. B. 747. *Kearney* v. *London, Brighton & South Coast Railroad*, L. R. 6 Q. B. 759, 762. In some of our more recent decisions, the presumption standing alone is stated to

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be sufficient to support an inference of negligence, unless the defendant, by going forward with the evidence, offers what the jury may find to be an adequate or satisfactory explanation. *Le Barron* v. *East Boston Ferry Co.* 11 Allen, 312, 316, 317. *Feital* v. *Middlesex Railroad*, 109 Mass. 398. *Joy* v. *Winnisimmet Co.* 114 Mass. 63. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143, 146, 147. *Cassady* v. *Old Colony Street Railway*, 184 Mass. 156, 162. *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295. *Egan* v. *Old Colony Street Railway*, 195 Mass. 159. *Minihan* v. *Boston Elevated Railway*, 197 Mass. 367. But whichever form of expression may be chosen, *prima facie* evidence in legal intendment means evidence which if unrebutted or unexplained is sufficient to maintain the proposition and "warrant the conclusion to support which it is introduced." *Emmons* v. *Westfield Bank*, 97 Mass. 230, 243. *Crane* v. *Morris*, 6 Pet. 598, 611. A *prima facie* case, when made out, does not however, either necessarily or usually, change the burden of proof. It stands only until the contrary is shown. *Commonwealth* v. *Kimball*, 24 Pick. 359, 365. *Wilder* v. *Cowles*, 100 Mass. 487. The distinction between the burden of proof and the weight or preponderance of the evidence is sometimes overlooked. In the sense of the burden of the evidence, the burden of proof may change from one side to the other as the trial proceeds, but in the sense of maintaining the issue involved in the action it constantly remains on the party alleging the fact which constitutes the issue, and, when all the evidence has been introduced, the jury must say whether it has been maintained. *Central Bridge Co.* v. *Butler*, 2 Gray, 130, 132. It is in this sense that the phrase has been employed, or impliedly understood, in the class of cases in our reports to which the case at bar belongs. The defendant in the explanation which it offered was not called upon to account satisfactorily for the accident, although oftentimes when this has been done the presumption of the carrier's carelessness disappears, but only to show or explain that it had not been guilty of negligence. After it had introduced evidence from which the jury could find that it had used due care in the construction, equipment and maintenance of the railway, the burden of proof had not been shifted but still remained upon the plaintiff to

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establish the defendant's negligence upon all the evidence, of which the presumption or inference of negligence upon proof of the derailment and injury formed only a part.

The requests, therefore, except so far as given, were properly refused, and the instructions, which fully and accurately recognized this distinction, were correct in law.

Exceptions overruled.

JOHN G. LOCKWOOD *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 10, 1908. — January 6, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Street railway. *Carrier*, Of passengers. *Proximate Cause. Practice, Civil*, Conduct of trial. *Evidence*, Expert: opinion. *Witness.*

At the trial of an action against a street railway company to recover for injuries alleged to have been received by the plaintiff while he was a passenger upon an open electric car of the defendant and to have resulted from the car's negligently having been caused to come in collision with a wagon in the street, there was evidence tending to show that the plaintiff and a companion signalled from the sidewalk of a crowded street for the car to stop and, the motorman having inclined his head, started from the sidewalk, passed behind a wagon and, the car having stopped, got upon the running board; that the wagon, which the plaintiff and his companion had passed behind to reach the car, continued on ahead of and in close proximity to the car and that both the conductor and the motorman saw it, that on a signal from the conductor, who had seen the plaintiff getting upon the car, the car proceeded before the plaintiff could take a seat, and the wagon struck the plaintiff's companion and knocked him against the plaintiff, who in the act of taking a seat had one foot on the car floor and one on the running board, and caused him to fall into the street. Subject to exceptions by the defendant, the presiding judge submitted the case to the jury, who found for the plaintiff. *Held*, that the exceptions must be overruled, since there was evidence from which the jury were warranted in finding that the plaintiff had been accepted by the defendant as a passenger and was in the exercise of due care, that the motorman and the conductor were negligent and that their negligence, in causing the plaintiff's companion to be knocked against him and thus to throw him from the car, was the proximate cause of the plaintiff's injury.

One, who has been accepted as a passenger upon an open electric car in a crowded street in a city and who is passing from the running board to a seat, has a right to assume that, while he is doing so, the car will not be started until all danger of its running so near to teams in the street as to injure him has passed.

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The principle, applicable to railroad companies whose trains stop only at fixed stations, that they hold themselves out as carriers offering transportation only to such persons as present themselves in the usual way at stations, has not been applied to street railways whose operating companies have not promulgated a rule that passengers will not be taken on except at designated places.

The mere facts, that one boarded an open electric car while it was moving slowly and at a point between two of the regular stopping places of the car on a street crowded with traffic, will not preclude such person from recovering from the street railway company for injuries received by him by reason of the car's negligently being caused to run into too close proximity to a wagon in the street, if it also appears that he had been accepted as a passenger.

In determining whether or not an exception to a designated portion of a charge to a jury should be sustained, the charge should be considered as a whole, and, if as a whole it is legally correct and not likely to mislead the jury, the exception will be overruled although the portion objected to is open to deserved criticism.

One, who had been called to testify as a medical expert on behalf of the defendant at the trial of an action of tort for personal injuries, after having stated that he had examined the plaintiff just before the trial and had found that he was suffering from a marked case of nervous prostration, and that such a condition was a very unusual one after an accident, was asked by the defendant's counsel "What do you base your opinion on?" and replied, "In a long series of investigations made by me . . . I found that, outside of cases where there was litigation, accident produced nervous prostration in only about one half of one per cent." On motion of the plaintiff, that portion of the answer relating to litigation was struck out, and the defendant excepted. *Held*, that the exception must be overruled, since the witness could not, under the guise of reasons for his opinion, indirectly testify that the nervous prostration from which the plaintiff was suffering was due to his being the plaintiff in litigation seeking recovery for his injuries.

At the trial of an action against a street railway company for personal injuries suffered by the plaintiff while he was a passenger on a car of the defendant, a material question in issue was, whether the car was moving when the plaintiff boarded it. A witness for the defendant testified in direct examination that the car had stopped at a crossing before the point where the plaintiff had boarded it and had not stopped again until after the accident, and he identified a statement which he had received in blank from the defendant "afterwards" with a request to fill it out and mail it to the defendant. In cross-examination he stated that he was reading a newspaper at the time of the accident and did not think he noticed whether the car stopped or not after the crossing designated. In redirect examination, "as bearing on the question as to how soon his attention" was called to the matter after the accident, the defendant asked "And when you received that blank . . . were you asked to state whether the car was moving or standing when" . . . [the sentence was not completed.] The question was excluded and the defendant excepted. *Held*, that the exception must be overruled.

TORT for injuries alleged to have been received by the plaintiff while he was a passenger on an open electric street car of the defendant a short distance north of Essex Street on Washington Street in Boston, by being thrown from the car because

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of a collision between it and a wagon in the street. Writ in the Superior Court for the county of Suffolk dated August 24, 1905.

This case and an action by the plaintiff's companion Gould against the defendant were tried together before *Raymond*, J.

Joseph W. Courtney, M.D., the defendant's medical expert, testified that he examined the plaintiff just before the trial and found that he was suffering from a marked case of nervous prostration. "Q. Whether or not such a condition as you found is an unusual thing? A. After accident? Yes, very. — Q. What do you base that answer on? A. In a long series of investigations made by me at the City Hospital I found that, outside of cases where there was litigation, accident produced nervous prostration in only about one half of one per cent." Upon objection by the plaintiff and subject to an exception by the defendant, the part of the answer about litigation was stricken out.

One Bretschneider, called by the defendant, testified in direct examination that he was a passenger on the car which the plaintiff boarded, that the car had stopped at Essex Street but did not stop again until after the accident. He also identified a blank that he had received from the defendant "afterwards" with a request to fill it out and mail it to the defendant. In cross-examination he testified in substance that he was reading his newspaper at the time the car passed Essex Street. "Q. So if you were reading the paper when the car passed Essex Street you would not notice whether the car stopped there or not? A. No, sir, I don't think I did."

With regard to his redirect examination, the record stated as follows: "Q. Was your attention called to the question whether the car had stopped immediately before this accident? A. Before the car stopped my attention was taken. — Q. Before the car came to a stop? A. Before the car came to a stop. — Q. And when you received that blank from the elevated were you asked to state whether the car was moving or standing when . . . (Objected to)."

"Mr. Dodge (the defendant's counsel): Only as bearing on the question as to how soon his attention was attracted."

The evidence was excluded and the defendant excepted.

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At the close of the evidence, the defendant requested the presiding judge to instruct the jury as follows:

"1. On all the evidence your verdict must be for the defendant.

"2. If you find that the car was moving when the plaintiffs boarded it, your verdict must be for the defendant.

"3. There is no evidence in this case of negligence on the part of the motorman.

"4. If the car was moving when the plaintiffs boarded it and had not reached the regular stopping place, your verdict must be for the defendant.

"5. If the plaintiffs jumped on the car knowing that it was passing or about to pass the wagon, they cannot recover.

"6. If the plaintiffs boarded the car while it was moving, they did not become passengers, and the defendant owed them only the duty of ordinary care.

"7. If the plaintiffs passed around a moving wagon, close to the rear thereof, and jumped upon a moving car and immediately thereafter were injured through the contact of Gould with the wagon, they cannot recover.

"9. If you find that the plaintiffs knew that the car was passing or was about to pass the wagon, then if their own failure to use their eyes and observe the location of the wagon contributed in any degree to the accident, they cannot recover.

"10. If the car was moving and had not reached the white post when the plaintiffs boarded it, and if the motorman did not know they were getting on, they cannot recover.

"12. If the plaintiffs boarded the car while it was moving and before it reached a regular stopping place, they did not become entitled to the rights of passengers."

The presiding judge refused to give the above instructions as requested. On the question whether or not the plaintiff was a passenger, he instructed the jury as follows:

"Was the plaintiff, or were the plaintiffs, passengers at the time of the accident? You heard the testimony with reference to that, the testimony on their part, that they signalled the car and the car came to a stop, as they were recognized by a servant of the company, and they crossed to the running board and stepped up on it, coming in contact with the car, and taking

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hold of some part of the car to assist them to climb up on the running board. If you should find that those were the facts in the case, then I instruct you that the plaintiffs were passengers as soon as they came to the place where they took hold upon the car and attempted to step up upon the running board. If you should find that the plaintiffs signalled the car and the car checked its progress so that as reasonable men, seeing that they were recognized by the motorman or conductor, they should step over and take hold of the car to mount the car, even though the car had not come to a full stop, as soon as they took hold of the car and sought to climb upon the car, I instruct you that they would be passengers. On the question whether or not the car did check its headway at all, or whether it followed along the ordinary rate of progress that it had been following during the time previous to their signalling, there comes a closer question as to whether or not these parties were passengers at the time that they went upon the car. But I instruct you, gentlemen, in that regard, that if the car was following the slow rate of speed which has been testified by the parties here, both the parties here, that if the plaintiffs signalled the car and were recognized by the motorman or conductor or both in assent to their purpose to come upon the car, and following their recognition and the assent of the motorman or conductor to their coming upon the car and stepped up upon the running board, I instruct you that in that event they were passengers and were entitled to the rights of passengers. . . .

"If you should find that . . . the servants of the defendant company did not see them when they signalled the car or did not know that they were intending to come upon the car as passengers, and in no way either directly or indirectly, either expressly or by implication, assented to their becoming passengers upon the car, then you could find that they were not passengers, in which case the company, the defendant company, would not owe them the same degree of care that it would owe to passengers.

"I think there is no contention here that the parties were not seen at all by the conductor before they stepped upon the car. . . . My recollection is that there is testimony that the conductor did see these two men while they were approaching the car from the street, and then it would be for you to find whether by any

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recognition he expressed an assent to their evident purpose to become passengers on that car. If you find that he did not in any way, you would have the right to find that they were not passengers. . . ."

Other facts are stated in the opinion. There was a verdict for the plaintiff, and the defendant alleged exceptions.

R. G. Dodge, (*S. H. E. Freund* with him,) for the defendant.

J. E. McConnell, (*J. W. McConnell* with him,) for the plaintiff.

BRALEY, J. The defendant's exceptions to the refusal to give the first, seventh, ninth, tenth, eleventh and twelfth requests must be overruled. It was within the province of the jury to find, upon conflicting evidence, that the plaintiff and his companion Gould, desiring to become passengers, signalled an open car; that, the motorman having inclined his head in response, they started from the sidewalk, and when the car stopped boarded it with the knowledge of the conductor, and that the plaintiff had reached and stood upon the running board on his way to a seat at the time of the injury. If the jury so found, the relation of passenger and carrier had been established, and the defendant owed to him the duty of taking every reasonable precaution, which might be required for his safe transportation. *Millmore* v. *Boston Elevated Railway*, 194 Mass. 323. *Rand* v. *Boston Elevated Railway*, 198 Mass. 569. *Marshall* v. *Boston & Worcester Street Railway*, 195 Mass. 284.

The conductor, while asserting in his testimony that the car had not been stopped nor the plaintiff been recognized and accepted as a passenger, also stated that he saw him when he boarded the car and that he noticed at the same time the proximity of the wagon passing along in the same direction parallel with the car, with which the car shortly after came into collision. If under these circumstances the conductor gave the signal, or the motorman in the exercise of due diligence should have foreseen that it was dangerous to go ahead, and the car was started before the plaintiff had a reasonable opportunity to reach a seat or a position of safety, this furnished evidence which would warrant a finding that the defendant was negligent. *Weeks* v. *Boston Elevated Railway*, 190 Mass. 563. *Rand* v. *Boston Elevated Railway*, 198 Mass. 569.

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Nor could it have been ruled as matter of law, that the plaintiff was guilty of contributory negligence. If the plaintiff and his companion were believed, the team had passed them before they started from the sidewalk. Ordinarily the man of average prudence neither in taking steps to become, nor after he has been accepted as a passenger by a street railway, pauses deliberately to consider whether, under the usual conditions of public travel, the car will be so operated as to come into contact with a team which has just passed going in the same direction. A failure to take this precaution, while a matter to be considered by the jury, affords no conclusive presumption of carelessness. Apart from any knowledge he could have been found to have had of the closeness of the team to the running board owing to the street being crowded by traffic, the plaintiff also had a right to rely upon the assumption, that, while he was in the act of getting on and passing to a seat, the defendant's servants would not start the car until all danger of its running so near to the team as to injure him had passed. *Pomeroy* v. *Boston & Northern Street Railway*, 193 Mass. 507, 512.

It is further contended, that the efficient cause of the plaintiff's injury was the negligence of his companion, with whom he had boarded the car and who, having been first struck by the team while standing on the running board preparatory to taking a seat, was thrown against the plaintiff, forcing him against one of the stanchions from which he was thrown into the street. But, even if the contact of the plaintiff's companion indirectly forced him off, this fact was not an independent intervening cause which would exonerate the defendant, for, if the collision had not occurred through the defendant's negligence, the plaintiff would not have been injured. *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168, 172. Besides, notwithstanding it is assumed to the contrary in argument, the defendant had the benefit of the eleventh request which was given in general terms.*

It is the defendant's theory of the injury, upon the evidence which it introduced, that, without having been either recognized or accepted as a passenger, the plaintiff was injured while in the

* This request was as follows: "If the proximate cause of Lockwood's injury was negligence on the part of Gould, then Lockwood cannot recover."

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attempt to board a moving car as it was passing between the signal posts. Undoubtedly there must be an acceptance by the carrier, before the person who offers himself, becomes a passenger. But the principle as applied to those who offer themselves for transportation by railroads, whose trains stop only at fixed stations, where the carrier only holds itself out to receive and transport as passengers those who present themselves in the usual way, has not been held applicable to passengers upon street railways, unless at least it appears that the operating company makes a rule that passengers will not be taken on except at designated places. *Merrill* v. *Eastern Railroad*, 139 Mass. 238. *Webster* v. *Fitchburg Railroad*, 161 Mass. 298. *Corlin* v. *West End Street Railway*, 154 Mass. 197. There was no evidence offered by the defendant, that it had made, promulgated or enforced such a rule, or established such a custom. Nor did it appear that the plaintiff had any knowledge of such a regulation inferentially derived from his observation of the placing of signal posts, or of the manner in which its cars were generally operated. *McDonough* v. *Boston Elevated Railway*, 191 Mass. 509, 511.

But, even if the car had been boarded while it was moving slowly between the signal posts after the plaintiff had stepped on the running board, the conductor, who testified that he saw the men coming to get on the car and further said that he saw the plaintiff there, gave no order to him not to get on, and made no objection or dissent either verbally or by gesture that he was unlawfully on board. To remain standing on the running board of an open street railway car while being transported is not ordinarily of itself wrongful; and under these conditions the contract of carriage could have been found by the jury to have been complete. *Briggs* v. *Union Street Railway*, 148 Mass. 72, 75. *Pomeroy* v. *Boston & Northern Street Railway*, 193 Mass. 507, 511, and cases cited.

The exceptions to the instructions under which the case was submitted to the jury are also untenable. A charge is to be considered as a whole in order to determine whether it is legally correct, rather than tested by fragments, which may be open to deserved criticism. In presenting the two theories of the relation of the parties, after having stated the plaintiff's and the

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defendant's respective contentions and instructed the jury as to each, the presiding judge continued, "If you should find that those circumstances did not exist, gentlemen, if you should find, for instance, that the servants of the defendant company did not see them when they signalled the car, or did not know that they were intending to come upon the car as passengers, and in no other way directly or indirectly, either expressly or by implication assented to their becoming passengers upon the car, then you could find that they were not passengers, in which case the company, the defendant company, would not owe them the same degree of care that it would owe to passengers. . . . If you find he did not in any way, you would have the right to find that they were not passengers." It is urged, that the jury should have been told, that, if they found no express or implied acceptance of the plaintiff as a passenger, they were bound to find for the defendant. The instructions, however, as to whether the plaintiff and the defendant had entered into this relation were explicit, and the jury must have understood fully that the plaintiff could not recover if he stepped and remained upon the running board without having been recognized by the servants of the company as a passenger.

The remaining exceptions are to the exclusion of evidence. If the defendant's medical expert could not properly have been directly asked, nor permitted to testify, that the nervous prostration from which he had found the plaintiff to be suffering was due to his having an action on hand to recover damages for personal injuries, he could not, under guise of reasons for the opinion which he gave in reply to a proper question, indirectly introduce such evidence. Having done so, the ruling excluding this part of the answer was right. *Hunt* v. *Boston*, 152 Mass. 168, 171. The paper containing the written statement, which at the defendant's request one of its witnesses presumably made on a blank furnished by the company, was rightly excluded, as there was no offer to show what the defendant expected to prove, or even that the witness, whom it apparently intended to contradict, had made a different answer, nor was the paper formally offered in evidence. *Magnolia Metal Co.* v. *Gale*, 191 Mass. 487.

Exceptions overruled.

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THOMAS A. ROWELL *vs.* NATHAN P. GIFFORD.

Essex. November 5, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

While an employee, who in an action of tort is seeking recovery from his employer for an injury alleged to be due to such a defect in the ways, works or machinery used by the employer as the employer would be accountable for either under R. L. c. 106, § 71, cl. 1, or at common law, cannot maintain his action if the evidence at the trial of the action leaves it a matter of conjecture, whether the cause of the injury to the plaintiff was such a defect or was an improper adjustment of machinery due to carelessness of the plaintiff or of a fellow employee, nevertheless the plaintiff is not obliged to exclude all doubt as to the cause of the accident, but only to show by a fair preponderance of the evidence that its cause was such a defect as was alleged in his declaration.

At the trial of an action of tort for personal injuries, brought against the proprietor of a factory by one who was a skilled and experienced employee therein, the presiding judge ordered a verdict for the defendant at the close of the plaintiff's evidence, and the plaintiff alleged exceptions. There was evidence tending to show that the plaintiff's hand was cut off while he was operating a buzz planer, and that it was possible that the accident might have been caused by an improper adjustment of the apparatus by the plaintiff or a fellow employee. The jury would have been warranted in finding, however, that a preponderance of the evidence tended to show that the accident was caused by a loose pulley, which was attached to the cylinder of the planer and which caused the cylinder to jump and the plaintiff's hand thus to be thrown on to the knives of the cylinder, that it was not the plaintiff's duty to repair the pulley, and that he did not know of its defective condition. *Held*, that the plaintiff's exception must be sustained, since he had not as matter of law assumed the risk of the injury he received, because he did not know of the defect, and since there was evidence warranting a finding that when injured he was in the exercise of due care and that his injury was caused by the defective pulley, for which the defendant was accountable.

TORT for personal injuries alleged to have been received by the plaintiff, while he was in the defendant's employ in his factory and planing a board upon a buzz planer, by reason of a defect in the planer. The declaration contained a count at common law alleging a failure of the defendant to furnish suitable machinery and to keep it in proper condition, and a count under R. L. c. 106, § 71, cl. 1, alleging a defect in the ways, works or machinery of the defendant. Writ in the Superior Court for the county of Essex dated February 16, 1905.

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The case was tried before *White*, J., who, at the close of the plaintiff's evidence, ordered a verdict for the defendant; and the plaintiff alleged exceptions. The facts are stated in the opinion.

A. W. Putnam, (*J. F. Quinn* with him,) for the plaintiff.

D. N. Crowley, for the defendant.

MORTON, J. This is an action of tort, brought originally by the plaintiff's intestate and after his death prosecuted by his administratrix, to recover for injuries received by him while at work in the defendant's employment upon a buzz planer in the defendant's factory. At the close of the plaintiff's evidence the presiding judge directed a verdict for the defendant subject to the plaintiff's exceptions, the parties stipulating that, if the exceptions should be sustained, judgment should be entered for the plaintiff in the sum of $2,000.

There was evidence tending to show that the machine was defective. Witnesses testified that the pulley on the end of the shaft to which the cutting cylinder was attached was loose, and that this would cause the cylinder to jump, and that the jumping would tend to throw the hand of the operator on to the knives in the cylinder. There was also evidence tending to show that the movable table was not adjusted as securely as it ought to have been, and that that might have had something to do with the accident. There was no defect in the table or in the appliances for securing and adjusting it, and any failure to properly secure or adjust it would have been due to the negligence of the plaintiff's intestate or that of a fellow workman. And if the accident was due to the improper adjustment or fastening of the table, or if the evidence was such as to leave it a matter of conjecture, whether the accident was due to that, or to the loose pulley, the defendant would not be liable. But we do not think that it can be said that as the case was left the cause of the accident was wholly a matter of conjecture, and we think that it fairly could have been found that the cause of the accident was the loose pulley. No other cause seems to have been regarded as so adequate to explain the accident as that. The plaintiff was not obliged to exclude all doubt as to the cause of the accident, but was bound to show by a fair preponderance of the evidence that the cause was one for which the defendant was, or could be found to be, liable.

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If the pulley was loose then it was a question for the jury whether the defendant in the exercise of due care should have discovered and remedied the defect, or whether he was justified in waiting until some one of the workmen called his attention to it and then having it properly repaired as he did. The plaintiff's intestate was a skilled and experienced workman and understood all about the machine, but the evidence shows that he did not know that there was any defect in the machine, and therefore he cannot be said to have assumed the risk. It cannot be said as matter of law that there was no evidence to show whether he was or was not in the exercise of due care. So far as appears, he was operating the machine in the usual way with material and for a purpose with and for which he was expected to use it. On the whole, though the case is not entirely free from doubt, we think that the evidence would have warranted a verdict for the plaintiff, and that the exceptions must be sustained.

Exceptions sustained; judgment for the plaintiff in the sum of $2,000.

WALTER P. HARDY & another, executors, *vs.* ANNIE S. W. MARTIN & another.

Essex. November 5, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Evidence, Remoteness. *Probate Court*, Appeal. *Practice, Civil*, Conduct of trial.

It is within the discretion of a single justice, before whom is being tried on appeal from the Probate Court an issue as to the sanity of a testator at the time of the execution of an alleged will, to designate a limited period of time, evidence as to acts and events within which bearing on the issue would be admitted and other evidence excluded as remote; and it is not an unreasonable exercise of such discretion, at the trial of such an issue regarding a will executed by a woman sixty-two years of age, whom those objecting to the proof of the will contended was suffering from congenital insanity, to set as such limit a time six years before the time when the will was executed.

APPEAL from a decree of the Probate Court for the county of Essex allowing the will of Sarah E. Wells, late of George-

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town, who died on May 17, 1907, at the age of sixty-three years.

Issues were framed in this court as to sanity of the testatrix at the time of the execution of the will and as to whether its execution was procured by fraud or undue influence, and were tried before *Sheldon*, J., and determined in favor of the petitioners. The appellants alleged exceptions to certain rulings of the presiding justice regarding the exclusion of evidence described in the opinion.

V. C. Lawrence, (*D. J. O'Connell* with him,) for the appellants.

J. P. Sweeney, for the appellees.

HAMMOND, J. The will was executed October 20, 1906, and the testatrix died May 17, 1907. After formal proof of the will counsel for the appellants in his opening stated "that it was the intention of the appellants to show that the said Sarah E. Wells was insane at the time of the making of the alleged will, and that she had congenital insanity, and that it was their intention to show her congenital insane mind by a long series of acts and conduct on the part of the testatrix beginning with her early childhood and continuing up to within a few years of her decease, such as stealing from stores, relatives and others, cruel and abusive treatment of her mother, and declarations and acts showing a morbid and abnormal love for money, these acts being so numerous and of such a character as to establish the fact of her being a kleptomaniac; that many times previous to the date of her mother's death, she deprived her mother of the necessary comforts of life; that she abused her physically and that previous to 1900 she committed many acts and made many declarations showing a lack of moral sense and obligation, and that she was unbalanced and insane on the subject of money, all indicating congenital unsoundness of mind."

"After counsel for the appellants finished his opening, . . . the presiding justice said that in view of the statements made by counsel for the appellants' . . . he should rule that the appellants might put in evidence as to insanity on the part of the ancestors of the testatrix, but with reference to her own conduct he did not think he should allow counsel for the appellants to open all her, the alleged testatrix's, life; that the question of her own

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unsoundness of mind at the time of the execution of this will, and her conduct or indications of sanity or insanity within a reasonable period before that would be competent, but that he should impose some limit of time, and he did not think that the matters that took place between her and her deceased father in 1894 should be gone into. That as the will in question was made in 1906, he thought if he allowed both sides on any question as to the conduct of the testatrix to go back to the year 1900, he was dealing more liberally than in strictness he should."

Thereafter in the course of the trial the presiding justice ruled in accordance with his intention and excluded all evidence before 1900. It is now contended by the appellants that evidence offered by them having a very material bearing upon the question of congenital insanity was wrongfully excluded. An examination of the record shows that much of this evidence was entirely incompetent, and also that much of it, even if it related to a point subsequent to 1900, was of such a character as that it might properly have been excluded at the discretion of the presiding justice, upon the ground that it involved a trial of collateral facts having too remote a causal relation to the issues on trial.

But without reference to these considerations we think that the exceptions must be overruled. Obviously there must be some limit of time on an inquiry into the mental condition of a testator, and the rule is stated by Allen, J., in *Howes* v. *Colburn*, 165 Mass. 385, 387. In that case the single justice limited the introduction of evidence of specific acts of unsoundness of mind on the part of the testator to a period "from about eight years before the date of the will to about two and a half years after its date," and the following remarks of Allen, J., in that case are peculiarly applicable to this: "This was within the power of the court to do, and its power in this respect was not taken away by the fact that expert witnesses for the contestants thought a better judgment as to the testator's soundness of mind could be formed if these limits were extended. It has been declared heretofore that such testimony must be sufficiently near in point of time to aid in determining the testator's condition at the time of making the will, and that this is a matter for

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the court to decide. *White* v. *Graves*, 107 Mass. 325. *Shailer* v. *Bumstead*, 99 Mass. 112, 130. *Commonwealth* v. *Pomeroy*, 117 Mass. 143, 148. *Lane* v. *Moore*, 151 Mass. 87, 90. *Dumangue* v. *Daniels*, 154 Mass. 483, 486. In the present case, the trial was a long one, the period fixed appears to have been sufficiently liberal, and but for the limitation put upon the introduction of evidence the trial might have consumed an unreasonable length of time. No exception can be sustained to the exclusion of the testimony relating to times outside of the limits so fixed." See also *Davis* v. *Davis*, 123 Mass. 590.

Exceptions overruled.

LUELLA McGILVERY, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 9, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Boston Elevated Railway Company. Railroad. Words*, "Railroad."

The means used for the transportation of passengers by the Boston Elevated Railway Company in the subway in Boston on February 13, 1905, did not constitute a "railroad" within the provisions of R. L. c. 106, § 71, cl. 3, and therefore an employee of that corporation, who on that day was injured by reason of the negligence of a person in the employ of the company and in charge and control of a signal used for the starting and stopping of trains at the Scollay Square station in the subway, could not recover under such clause of the statute.

St. 1908, c. 420, which amended R. L. c. 106, § 71, cl. 3, by adding provisions as to elevated railways so that the wording of its provision imposing upon an employer a liability for an injury to an employee caused by "the negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad" was so changed as to make an employer liable for such an injury caused by "the negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, elevated train or train upon a railroad or elevated railway," is not declaratory of the law as it existed under the Revised Laws, but imposes upon elevated railway companies a burden to which they had not been subject under the Revised Laws.

TORT under R. L. c. 106, § 71, cl. 3, for personal injuries alleged to have been received by the plaintiff's intestate while he was in the employ of the defendant on February 13, 1905,

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and to have been caused by the negligence of a person in the service of the defendant who was in charge or control of a signal, namely, a starting gong, at the Scollay Square subway station in Boston. Writ in the Superior Court for the county of Suffolk dated April 20, 1905.

The case was tried before *Sherman*, J. At the close of the evidence the presiding judge was of the opinion that the case did not fall within R. L. c. 106, § 71, cl. 3, but, informing the parties that he should "set aside any verdict that might be rendered for the plaintiff and report the case," he, in order "to avoid as far as possible the necessity of another trial," submitted the case to the jury with instructions that, if they were of opinion that the plaintiff's intestate while in the exercise of due care was injured by reason of the negligence of some employee of the defendant in charge or control of a signal, the plaintiff would be entitled to a verdict.

The jury found for the plaintiff in the sum of $2,500, and, upon motion by the defendant, the presiding judge set aside the verdict as against the law, ruling that the case was not within R. L. c. 106, § 71, cl. 3, and reported the case for determination by this court, it being agreed by the parties among other things that, if the ruling was correct, judgment was to be entered for the defendant.

J. P. Magenis, (*J. B. Boland* with him,) for the plaintiff.

S. H. E. Freund, (*R. G. Dodge* with him,) for the defendant.

HAMMOND, J. The crucial question is whether as contended by the plaintiff the train of the defendant is a train upon a railroad within the meaning of R. L. c. 106, § 71, cl. 3, or, more briefly stated, whether the railroad of the defendant is a railroad within the meaning of that clause. If it is not, then there must be judgment for the defendant.

The clause first appears in St. 1887, c. 270, and provides that under certain conditions named in the statute a right of action may arise against an employer in favor of an employee who, while in the exercise of due care, is injured by reason of "the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." At the time this act was passed the defendant had not been chartered, and it is not contended by

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the plaintiff that there was any elevated railway in the Commonwealth. In *Fallon* v. *West End Street Railway*, 171 Mass. 249, it was held that a street railway car, operated by electricity upon a street railway track, was not a "locomotive engine or train upon a railroad" within the meaning of this clause. In giving the opinion of the court Morton, J., used the following language: "But we think that by the words 'locomotive engine or train upon a railroad' must be understood a railroad and locomotive engines and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. This undoubtedly was the sense in which the words were used by the Legislature when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends. Possibly a railroad, where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."

The original charter of the defendant is to be found in St. 1894, c. 548. This statute was the outgrowth of an agitation extending over several years with reference to rapid transit in Boston and its suburbs; and it provided in the first part for the incorporation of the defendant, and in the last part for the creation of the Boston Transit Commission, with power to build certain subways. The defendant was empowered to construct "lines of elevated railway" through certain specially designated streets (§ 6), and to take by "purchase or otherwise" certain lands outside the limits of these ways, for the purpose of constructing its railway and other necessary structures (§ 11). And it was subject to all general laws "which now are or may hereafter be in force relating to railroad corporations, so far as applicable, except as hereinafter provided"; but it was forbidden to transport freight or baggage (§ 1). The railway was to be constructed according to the Meigs system or such other plans or systems (except the Manhattan system then in use in New York), as the board of railroad commissioners might approve. It is unnecessary to go further into the details of this charter. While the corporation was authorized to use locomotives and

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trains with steam as the motive power and its road in some other respects resembled the ordinary steam railroad, still its route lay almost exclusively through the public ways, and in substance it was an elevated street railway, the purpose being to give more rapid transit to street travel.

No railway was built under this charter until after the important amendments which were made to it by St. 1897, c. 500. By that statute the restriction as to the Manhattan system was removed, and steam could not be used as a motive power (§ 2); and it was provided that with certain exceptions the corporation should have all the powers and privileges and be subject to all the duties, liabilities and restrictions of street railway companies so far as applicable; and finally, the provision of the first section of the original charter that the corporation should be subject to the general laws relating to railroad corporations "is hereby repealed." It is urged, however, by the plaintiff that throughout this amending statute the term "railroad" is frequently used to describe the defendant and in connection with its cars and other equipment. While this is true it does not seem to us to be conclusive as to the legal character of the defendant or of its road.

It is still further urged by the plaintiff that by R. L. c. 111, § 1, a railroad is described as "a railroad or railway of the class usually operated by steam power," and that the defendant's road may properly be held as coming within this class. But the history of this clause seems to look another way. The Revised Laws were enacted ten years after railroad corporations had been authorized to use electricity as motive power (St. 1892, c. 110), and five years after the defendant had been authorized to build the railway in question. In St. 1874, c. 372, § 2, a codification of the railroad acts up to that time, the term "railroad" was defined to mean "a railroad or railway operated by steam power," and it was not until R. L. c. 111, § 1, that the definition was changed to "a railroad or railway of the class usually operated by steam power." Between 1874 and 1902 the Legislature had authorized railroads operated by steam power to use electricity as a motive power; and, realizing this and the possible tendency of the times to a more extensive use of electricity for this purpose, the Legislature adopted a change of phraseology which would indicate more clearly than the old phrase would the class

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of commercial railroads. The new phrase in our opinion was not to enlarge the class, but simply, under the changed conditions to indicate more precisely the individuals included in the former term. Therefore, even if the question rested here, the indications would point to the conclusion that at the time of the accident to the plaintiff's intestate, which occurred in 1905, the defendant's road was not a railroad within the meaning of the clause in question.

The question, however, is made comparatively easy of solution by reason of St. 1908, c. 420. This statute expressly changes this clause 8 which we have been considering, by adding to it the term "elevated railway" as distinguished from the term "railroad," and expressly makes the provision of the clause applicable to a train upon an elevated railway. We regard this statute not as declaratory of the law as before existing, but as amendatory. And the amendment consisted in imposing upon the elevated railway companies a burden to which they had not been subject before that time. It follows that at the time of the accident the railroad of the defendant was not a railroad within the meaning of R. L. c. 106, § 71, cl. 3, and that there must be

Judgment for the defendant.

FREDERICK A. TUBBS *vs.* CUMMINGS COMPANY.

Suffolk. November 10, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction, Performance and breach.

A manufacturer of boots and shoes at Worcester advertised for a salesman for certain western territory, and a salesman, who was a stranger to him and to whom the manufacturer was a stranger, answered the advertisement and furnished references. The salesman and the manufacturer thereupon on January 5 signed the following "memorandum of agreement": "T. [the salesman] to sell goods for C. [the manufacturer] exclusively and under his direction in the States of Indiana — Illinois — Michigan and Wisconsin and such other territory as may be mutually agreed upon. C. agrees to advance T. $75 to cover his first weeks salary and legitimate travelling expenses . . . and thereafter $50 each week for such time as T. shall be travelling in [C.'s] exclusive interest and under his direction. If T. shall complete a full year's service in the exclusive interest of C., and his accepted orders shall have been filled and

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payment received by C. in excess of $48,000," T. was to receive "an additional sum equal to five per cent," of such excess. *Held*, that the contract was a hiring by the week at most and not by the year or for a year.

If, according to the provisions of a contract in writing for employment, payments are to be made weekly to the person employed, this circumstance, while it is of but little if any weight where other language in the contract expressly or impliedly describes the term of service to be longer than a week, nevertheless, in the absence of such other evidence, is of great weight in showing that the employment is by the week.

CONTRACT upon a written agreement of employment. Writ in the Superior Court for the county of Suffolk dated January 30, 1907.

At the trial before *Wait*, J., it appeared that, immediately after making the contract set forth in the opinion, the plaintiff went to Detroit, Michigan, where he arrived January 7, 1907. On January 17 the defendant wrote a letter to the plaintiff, criticising his work and containing the following: "We are extremely sorry that you could not have found time to do a little work outside of Detroit, between heats as it were, while waiting for this seemingly unmaterialized business. It is enjoyable we grant you, but most too expensive to put in two weeks in one place for such a small amount of business as you are evidently to get out of it. Don't hibernate. Get away from Detroit and good living for a while, get out, get to work and hustle hard for business."

On January 18 another letter of criticism was sent to the plaintiff by the defendant, and on January 19 the defendant telegraphed to the plaintiff: "Report at factory with samples at once."

On January 19 the plaintiff wrote, in reply to the defendant's communication of January 17 and the telegram of January 19, a letter which was received by the defendant on January 21, containing the following: "I have done my duty in your behalf and worked early and late for your interest, and went according to my instructions, and see no reason to be treated the way I have been, but it is no more than I expected from such people as you that don't know the first thing about selling shoes let alone treating your men with respect. You have not kept your word with me in anything you agreed to do and feel more than glad that this has turned out as it has. God knows what you would have done if I got any further west. I am here at your expense and will be until you send me money to pay my bill and expense of getting home." Subsequent letters, written

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to the defendant by the plaintiff while he was waiting in Detroit, contained the following: "Send me my check. I want to come home, and very glad that did not get any further." "You are obliged to get me home so every moment's delay is adding to the expense. The business that I have, I shall turn down."

The defendant sent a representative to Detroit who returned to Massachusetts with the plaintiff on January 21. On January 24 the defendant wrote to the plaintiff formally discharging him from its employ. Other facts are stated in the opinion.

At the close of the evidence, the defendant requested that a verdict be ordered for the defendant. The jury found for the plaintiff; and the defendant alleged exceptions.

J. W. Spaulding, for the defendant.

H. H. Bond, for the plaintiff.

HAMMOND, J. This is an action of contract to recover salary for one year (less such sums as the plaintiff earned in other employment after his discharge), upon the following contract:

"Worcester, Mass. Jan. 5, 1907.

"Memorandum of agreement between Mr. Frederick A. Tubbs and The Cummings Co., Mr. Tubbs to sell goods for The Cummings Co., exclusively and under their direction in the States of Indiana — Illinois — Michigan and Wisconsin and such other territory as may be mutually agreed upon. The Cummings Co. agree to advance Mr. Tubbs the sum of $75 to cover his first weeks salary and legitimate travelling expenses beginning Jan. 5th, 1907, and thereafter the sum of $50 each week for such time as Mr. Tubbs shall be travelling in their exclusive interest and under their direction.

"If Mr. Tubbs shall complete a full year's service in the exclusive interest of The Cummings Co., and his accepted orders shall have been filled and payment received by The Cummings Co., in excess of ($48,000) forty-eight thousand dollars in that year, Mr. Tubbs shall be entitled to receive from The Cummings Co., an additional sum equal to five per cent on whatever amount such orders shall exceed the sum of forty-eight thousand dollars.

"Frederick A. Tubbs,
The Cummings Co.,
"Albion S. Clement, Mgr."

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The plaintiff began work under the contract on January 5, 1907, and was discharged January 24, 1907.

At the trial the presiding judge ruled that "the contract was a contract for one year." To this ruling the defendant excepted. The exception must be sustained. Upon its face the contract was a hiring by the week at the most, and not by the year or for a year. The payments were to be made weekly; and while this circumstance is of but little if any weight where there is other language in the contract expressly or impliedly describing the term of service to be longer than a week, yet in the absence of such other language it is of great weight. In the contract before us there is no language expressly naming one year as the term of employment. Nor is the language such as to imply that such is the understanding of the parties. The reference to a "full year's service" is not made as if such service was one of the settled and absolute features of the contract, but merely as if it were a possible contingency. By the first paragraph of the contract the plaintiff's weekly salary was fixed for the time he should work. By the second it was provided that in certain contingencies he should receive an additional compensation. Those contingencies were two, namely: First, that he shall have completed "a full year's service"; second, that his accepted orders "shall have been filled and payment received by . . . [the defendant] . . . in excess of $48,000." One of these events was as contingent as the other. There is no fair implication that either was to be regarded as absolute. Such is the fair construction of the contract upon its face. The case differs materially from cases like *Norton* v. *Cowell*, 65 Md. 359, *Koehler* v. *Buhl*, 94 Mich. 496, *Kelly* v. *Carthage Wheel Co.* 62 Ohio St. 598, *Heminway* v. *Porter*, 94 Ill. App. 609, *Babcock & Wilcox Co.* v. *Moore*, 62 Md. 161, upon which the plaintiff relies. It more nearly resembles cases like *Harper* v. *Hassard*, 113 Mass. 187, although it is much stronger for the defendant than that case was. For a discussion of the law on this subject see *Maynard* v. *Royal Worcester Corset Co.* 200 Mass. 1.

And this construction is confirmed by the circumstances under which the contract was made. The defendant was a manufacturer of boots and shoes at Worcester in this State. Before

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January 5, 1907, it advertised for a salesman for certain western territory. The plaintiff saw the advertisement and applied for the position, furnishing references. After inquiries the defendant entered into the contract. The parties were strangers to each other. The plaintiff could not know that the defendant would be a reasonable or satisfactory employer, nor could the defendant know that the plaintiff would be an agreeable or successful salesman. Each might want to know more of the other before making a contract which would be binding for a long time. These circumstances point not so much to a contract for a year as to a contract in the way of a trial, on the part of the defendant, of the capacity of the plaintiff, and, on the part of the plaintiff, of the desirability of continuing in the employ of the defendant.

Moreover, the acts of the parties tend strongly to show that this view of the nature of the contract was plainly in accordance with their understanding. Within three weeks from the commencement of the service the defendant discharged the plaintiff, and the latter, while evidently feeling much aggrieved at the act as very unjust towards him, and while protesting that he had worked faithfully for the interests of the defendant, did not in any way claim at the time that the contract was for a year. On the contrary he seemed to accept his discharge as an act within the power of the defendant, and the chief wish he expressed was to get home.

It becomes unnecessary to consider the other exceptions.

Exceptions sustained.

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BENJAMIN B. BAMFORD *vs.* SEWELL N. BOYNTON.

Essex. November 12, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Bills and Notes. Practice, Civil.

Where a promissory note is made payable to the order of the maker and is indorsed by the maker, persons who indorse the note below the indorsement of the maker before the delivery of the note do not become joint makers or co-sureties, but have the rights against each other of successive indorsers.

At the trial of an action at law, in which no demurrer had been filed, the defendant before the jury had been empanelled asked the presiding judge to rule that upon the proof of all the allegations contained in the plaintiff's declaration the plaintiff would not be entitled to recover. The presiding judge refused to make the ruling, and this court, holding that the refusal was right because the declaration stated a good cause of action, found it unnecessary to decide whether the defendant properly could question for the first time the right of action stated in the pleadings after the case had been called for trial.

CONTRACT for the amount of a promissory note for $2,000, which the plaintiff had indorsed after the defendant, and had been compelled to pay. Writ dated May 29, 1905.

The defendant did not demur, but filed an answer.

In the Superior Court the case was tried before *Crosby*, J. The note declared upon was as follows:

"$2000. Boston, Jan. 7, 1905.

"Four months after date the Bay Side Coal Co. promises to pay to the order of the Bay Side Coal Co., two thousand dollars. Payable at any bank Lynn, with interest. Value received.

"Bay Side Coal Co.,
"Walter M. Magee, Treas."

Indorsements.

"Bay Side Coal Co.
By Walter M. Magee, Treas.
J. P. C. Batchelder,
Sewell N. Boynton,
B. B. Bamford."

The plaintiff offered evidence tending to prove that early in January, 1905, the defendant, who was the president of the Bay

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Side Coal Company, brought the note to the plaintiff; that at that time there were on the back the following signatures: "Bay Side Coal Co., by Walter M. Magee, Treas., J. P. C. Batchelder, Sewell N. Boynton," the defendant; that the defendant handed the note to the plaintiff, and that the plaintiff signed his name on the back of the note, below the others; that the defendant said it was all right, and that the defendant gave no further reason to the plaintiff for wanting him to write his name on the note; that when the note became due the Essex Trust Company, which was the holder of the note, after having tried to get the money from the Bay Side Coal Company and from the defendant, made the plaintiff pay the note, and that the plaintiff had received nothing from any of the other indorsers on account of such payment. On cross-examination the plaintiff testified that before he paid the note he asked the defendant to pay part of the note, that is, something on it; that no figure was stated, and that Johnson, the treasurer of the Essex Trust Company, wanted the defendant to pay the whole of the note; that the plaintiff was a stockholder and a director in the Bay Side Coal Company and had a share in determining what would be done by the company and in developing the property; that he had put in about $7,000 in all, including the note, and had been interested in furnishing money to promote the company; and that just before the note in suit was made there was a previous note for $4,000, which the counsel for the plaintiff admitted was in the same form and with the same indorsers on it as the note in suit; that the plaintiff signed the note in suit, which was used to take up in part the first note, and that $2,000 was paid, being the balance due on the first note.

The first two indorsers on the note in suit were not called as witnesses.

The defendant offered evidence tending to show that the note in suit was negotiated for the account of the plaintiff under the following circumstances: That the previous note for $4,000 came upon the plaintiff and the defendant to pay, they being the only good indorsers on that note; that the defendant was ready to pay his half of the $4,000, but that the plaintiff was unwilling to pay his half; that the defendant paid his half and at the request of the plaintiff gave the note in suit for $2,000, covering the

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plaintiff's half of the note for $4,000; that the note in suit was taken to the bank by the plaintiff and was discounted by the bank upon the credit and for the benefit of the plaintiff, and that the note in suit was identical with the first note except in time and amount, and was indorsed by the same indorsers.

Before the jury had been empanelled, the defendant asked the judge to rule upon the declaration and answer as follows: That proof of all the allegations pleaded by the plaintiff does not entitle him to recover because he alleges that he is one of several joint makers and indorsers of a certain described promissory note, and alleges payment of the same by himself, one of the indorsers, at its maturity after presentment and non-payment with notice, and the plaintiff brings this action upon the note against the defendant, one of his associates, as a successive indorser for the accommodation of a third party, to recover the amount paid by the plaintiff on the note, whereas according to his own allegations the plaintiff's relation to the defendant is that of a joint maker and indorser, and not that of a successive indorser for the accommodation of a third person.

The judge refused to make the rulings requested. The jury returned a verdict for the plaintiff in the sum of $2,341.83; and the defendant alleged exceptions.

The case was submitted on briefs.

J. E. Odlin, for the defendant.

S. Parsons, H. A. Bowen & J. F. Hannan, for the plaintiff.

HAMMOND, J. It is settled, in this Commonwealth at least, that in the absence of any agreement to the contrary in a case like this, the rights of the plaintiff and the defendant are not those of joint makers, or of co-sureties or guarantors, but are those of successive indorsers. *Lewis* v. *Monahan*, 173 Mass. 122, and cases cited. The declaration therefore was sufficient.

It follows that, even if the question involved in the ruling requested, not having been raised by demurrer, could have been raised for the first time by the defendant after the case was called for trial and before the jury were empanelled, the judge properly refused the ruling.

Exceptions overruled.

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DENNIS F. CRONIN *vs.* PHILIP BARRY.

Plymouth. November 12, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Replevin. Judgment. Practice, Civil, Appeal.

In an action of replevin for five articles, where the declaration contains but a single count, if it appears that the plaintiff owns four of the articles and is entitled to their possession, but that he does not own the fifth article and is not entitled to its possession, two judgments must be entered, as if there were two separate counts, one in favor of the plaintiff for four of the articles, and the other for the defendant directing a return of the fifth article, and each judgment may include costs.

If in an action of replevin brought in a police court for a bitch and four pups, the court enters a judgment for the defendant directing the return of one of the pups, describing it, and makes no order as to the bitch and the other three pups, an appeal by the plaintiff to the Superior Court from the judgment carries up the whole case, and should be interpreted as an appeal not only from the judgment for the return of the pup described but also from the failure to enter a decree in the proper form as to the other four dogs.

In an action of replevin brought in a police court for a bitch and four pups, the court entered a judgment directing the return of one of the pups, describing it, but failed to make any order as to the bitch and the other three pups. The plaintiff appealed to the Superior Court from the decree and claimed a trial by jury. The record of the Superior Court showed simply that in answer to the question "Did the pup in question belong to the plaintiff?" the jury said "No," and there was no record of any general verdict either for the plaintiff or the defendant or of any finding of the jury in regard to the bitch and the other three pups. The record contained a "Finding" as follows: "Judgment is to be entered for the plaintiff for one Boston terrier bitch and three pups, with costs; judgment for defendant for return of one bitch pup with costs." From the judgment entered in accordance with this finding the defendant appealed, contending that the question of the title to the Boston terrier bitch and the three pups decided to belong to the plaintiff was not before the Superior Court and that the judge of that court erred in undertaking to include them in the judgment. *Held*, that the appeal from the judgment of the police court brought up the whole case to the Superior Court, and that it could be assumed from the order of the judge of that court entitled "Finding" that, apart from the single issue left to the jury, the parties were content to submit all other questions to the judge rather than to the jury, and that upon such submission the judge, either upon evidence or upon statements of the parties, found that the four dogs other than the one whose ownership was passed upon by the jury were the property of the plaintiff, and, having so found, ordered judgment for the plaintiff on such findings and for the defendant on the finding of the jury; and therefore that the judgment was supported by the record and should be affirmed.

HAMMOND, J. This is an action of replevin, brought in the Police Court of the City of Brockton, to recover one Boston

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terrier bitch and four pups. The answer contains a general denial and an allegation that one of the pups is the property of Ryan and Snyder. Upon these pleadings the case was tried in that court and continued for judgment. The record shows that thereafter the following entry was made: "Judgment for defendant for return of young bitch pup with costs, $7.48," followed by a description of the pup for purposes of identification. The record shows no other judgment. From the judgment rendered the plaintiff appealed to the Superior Court and there claimed a trial by jury. The record of that court shows simply that in answer to the question "Did the pup in question belong to the plaintiff, Cronin?" the jury said "No"; and there is no record of any general verdict either for the plaintiff or the defendant, or that the jury dealt with the case so far as respected the bitch and the three other pups. Apparently the only thing the jury were asked to do was to answer the question whether that one pup belonged to the plaintiff. The record continues as follows: "Finding. In *Cronin* v. *Barry* judgment is to be entered for the plaintiff for one Boston terrier bitch and three pups, with costs; and judgment for defendant for return of one bitch pup with costs." Then follows a description of the last named pup, substantially like the description given in the police court. The defendant appealed from this "finding and order of entry of judgment," and the case is before us on this appeal.

The contention of the defendant, as stated by himself in his brief, is "that the question of title to the Boston terrier bitch and three pups was not before the Superior Court and that the order of the judge * of that court was erroneous in so far as he undertook to include them in the judgment."

The record of each court is peculiar, especially that of the police court. Before the lower court the question was whether the plaintiff could maintain his action as to the five dogs which had been taken on the writ. If he maintained his action as to all, then he was entitled to judgment as to all; if only as to a part of them then judgment as to that part. In the latter event there were two judgments to be rendered, one for the plaintiff as to the dogs he owned, and one for the defendant as to the rest of them. In such a case, although all the articles are de-

* *King*, J.

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clared for in one count, the case is dealt with as if there were two counts; and each party is entitled to prevail on one. Each party is an actor, and each may have judgment and costs. *Vinal* v. *Spofford*, 139 Mass. 126, and cases cited. If, therefore, the judge of the lower court had found for the plaintiff as to four of the dogs and against him as to the fifth, he should have entered an order in the nature of two judgments, one for the plaintiff and one for the defendant; and, if that had been done, then the appeal by the plaintiff from the judgment in favor of the defendant would have carried to the appellate court only the question as to the dog given to the defendant. *Vinal* v. *Spofford*, *ubi supra*.

But the judgment contained no express determination as to the dogs not given to the defendant; and in that respect was imperfect. The plaintiff therefore may well have appealed from the judgment upon the ground not only that one of the dogs was given to the defendant, but upon the further ground that none was given to the plaintiff; or, in other words, that the court had failed to enter a judgment in proper form. Such an appeal from such a judgment would carry the whole case to the Superior Court, and we are of opinion that under the peculiar circumstances it must be held that the appeal of the plaintiff carried the whole of this case to the Superior Court.

In that court, as before stated, the plaintiff claimed a trial by jury, but the only question submitted to them seems to have been the one above described, namely, whether "the pup in question" belonged to the plaintiff. We cannot look beyond the record, but we must interpret it as best we can. The order of the court is entitled a "finding," and is consistent with the theory that upon the answer of the jury the parties were content to submit all other questions to the judge rather than to the jury, and that upon such submission the judge either upon evidence or statements of the parties found that the four dogs other than the one whose ownership was passed upon by the jury were the property of the plaintiff, and having so found ordered judgment for the plaintiff on such finding and for the defendant on the finding of the jury. This construction of the record seems to be the most consistent. The record as it stands must govern the rights of the parties on this appeal, and we are bound by it.

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If expressly or by fair implication the construction of it be not in accordance with the actual truth, the remedy of the aggrieved party is to be found elsewhere than by appeal.

Judgment affirmed.

The case was submitted on briefs.

R. W. Nutter & C. C. King, for the defendant.

J. McCarty & M. Wilbur, for the plaintiff.

SARAH F. RALPH, administratrix, *vs.* CAMBRIDGE ELECTRIC LIGHT COMPANY.

SAME *vs.* SAME.

Middlesex. November 12, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence.

In an action by the administratrix of the estate of one who had been employed as a general repair man in a factory building, against an electric light company, whose wires, carrying a current of electricity more than sufficient to destroy human life, were attached to an upright pole with a cross arm upon the roof of the factory by permission of its proprietor, for causing the death and conscious suffering of the plaintiff's intestate by means of an electric shock received by him when in the course of his duty he had gone to the roof to repair a leak, it appeared that the plaintiff's intestate in some way received an electric shock and at some time after receiving it fell from the roof of the factory to the roof of a shed below, that he was conscious when assistance reached him and remained so for three quarters of an hour, when he died, that both of his hands were burned badly, the right one through to the bone, and that the back of his neck also was burned badly. A witness testified that, his attention being attracted by the groans of the intestate, he looked up and saw him on the roof of the factory, that he was on his back and was squirming around with his hands over the wire or two wires. No one saw the accident or testified to the manner in which it occurred. *Held*, that there was nothing to show that the plaintiff's intestate was in the exercise of due care, and that, as the manner of the accident was purely a matter of conjecture, a verdict properly was ordered for the defendant.

TWO ACTIONS OF TORT between the same parties and arising out of the same accident; the first under R. L. c. 106, § 72, for the death of the plaintiff's intestate, and the second at common

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law for the conscious suffering of the plaintiff's intestate before his death. Writs dated May 18, 1907.

In the Superior Court the cases were tried together before *Sherman*, J. The following facts among others appeared in evidence: The plaintiff's intestate was employed as general repair man for Houghton, Mifflin and Company at their factory building in Cambridge known as the Riverside Press. Upon the roof of this building the defendant corporation maintained, with the consent of Houghton, Mifflin and Company, an upright pole with a cross arm to which there were attached, among other wires, two high tension wires. These, at the time of the accident, carried approximately two thousand volts of electricity and the testimony in the case showed that that voltage was considerably above the amount required to destroy human life. The roof was flat on top, the flat portion being covered with tin, and on each edge sloped off through a space from twelve to fifteen feet, the sloping part being covered with slate. The upright in question was attached to the flat part of the roof and the wires started from it at a height somewhat above eight feet from the roof. The wires then slanted downward across the flat part of the roof and one of the sloping sides to a fixture on an adjoining building below and were covered with some sort of rubber insulation. The plaintiff's intestate was thirty-six years old at the time of the accident, which occurred on January 1, 1907, at about half-past eight o'clock in the morning. It was undisputed that the deceased in some way received an electric shock and at some time after receiving it fell from the roof of the building to the roof of a shed below. He was conscious when assistance reached him, and remained so for some three-quarters of an hour, when he died at the Cambridge Hospital. In addition to some broken bones, due to the fall from the roof, it appeared in evidence that both of the intestate's hands were burned badly, the right one through to the bone, and that the back of his neck also was burned badly. There was evidence that the intestate went to work that morning as usual and that about half an hour previous to the accident he went into his house, which was near by, where he saw his wife and obtained a glass of milk. His wife testified that he then appeared as he usually did, was apparently well and in good spirits. He then

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went back to the Riverside Press and was directed to go to the roof to repair a leak. He went into the shop and obtained some strips of zinc to use in the repairs, and while there spoke a few words with the foreman of the shop.

One Long testified that he was employed at the Riverside Press as day watchman and gardener. At the time of the accident he was in the yard of the building and within sight of the corner of the roof where the intestate was injured. His attention was attracted by the intestate's groans, and the witness looked up and saw him on the roof. He was on his back and was squirming around with his hands over the wire or two wires. His head was downward and was about three slates back from the edge of the roof. His body and feet were further back up the roof. The witness called to him and then started to run to his assistance, but when the witness got upon the roof the intestate had fallen off to the roof of the shed below.

There was other evidence, the character of which is described briefly in the opinion.

At the close of the plaintiff's evidence, the counsel for the defendant moved that a verdict be directed in each case for the defendant. The counsel for both parties then agreed that the judge should direct a verdict for the defendant in each case with the stipulation that, if he was wrong in so directing a verdict, judgment should be entered in the first case, under R. L. c. 106, § 72, for the plaintiff in the sum of $3,000 as damages, and in the second case, at common law, for the plaintiff in the sum of $500 as damages. Thereupon the judge ordered verdicts for the defendant, and reported the cases for determination by this court in accordance with the terms of the agreement of the parties.

A. P. Stone, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

HAMMOND, J. Even if it be assumed in behalf of the plaintiff that there was negligence of the defendant, still there is one fatal defect in each case. She has failed to show that the deceased was in the exercise of due care. From the time he began to ascend the ladder which led to the skylight in the roof until, about ten minutes later, he was seen by the witness Long "squirming" around upon the roof with his hands over the

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defendant's wires, nothing is known of the care he exercised in his movements. No one saw him or heard him, nor is there any circumstance shown which throws the slightest light as to his care for himself during that interval. The manner in which the accident occurred is purely a matter of conjecture. The case is clearly distinguishable in this respect from *Saures* v. *Stevens Manuf. Co.* 196 Mass. 543, and other similar cases cited by the plaintiff, and must stand in the class of which *Brodie* v. *Rockport Granite Co.* 197 Mass. 147, is a type.

In each case the entry must be

Judgment for the defendant.

WILLIAM HIRSH *vs.* DANIEL B. BEARD.

Suffolk. November 17, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Amendment. *Bankruptcy.*

It is within the discretion of the judge before whom a case has been tried to refuse to allow the defendant to amend his answer after a verdict has been returned for the plaintiff by setting up the defendant's discharge in bankruptcy granted while the case was pending.

CONTRACT for $105.84 had and received to the plaintiff's use. Writ in the Municipal Court of the City of Boston dated July 17, 1906.

The defendant filed an answer containing a general denial and an allegation of payment and also filed a declaration in set-off claiming $151.31 according to an account annexed.

On appeal to the Superior Court the case was tried before *Richardson*, J., on February 21, 1908, on which day the jury returned a verdict for the plaintiff in the sum of $81.61. On March 2, 1908, the defendant filed a suggestion of bankruptcy, alleging that on December 20, 1906, the defendant was adjudicated a bankrupt in the District Court of the United States for the District of Massachusetts under the provisions of the bankruptcy act of 1898, and acts in amendment thereto, and that on July 9, 1907, he was discharged from all debts and claims, in-

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cluding the plaintiff's claim against the defendant, which were provable against his estate in bankruptcy, the plaintiff having had full knowledge of the bankruptcy, and moving that the action might be continued for judgment.

On March 3, 1908, the defendant filed a motion to amend his answer by adding thereto the following: "And further answering, the defendant says that since said action was commenced, to wit, on the 20th day of December, 1906, he was duly adjudicated a bankrupt in the District Court of the United States for the District of Massachusetts, and that thereafter, on the 9th day of July, 1906, he was duly discharged from all debts, including the plaintiff's, which were provable against his estate." On March 30, 1908, the judge denied the motion to amend.

On March 31, 1908, the plaintiff moved that judgment be entered for the plaintiff in the sum of $81.61 in accordance with the verdict. On April 7, 1908, the judge filed the following memorandum of decision:

"At the hearing on April 6, 1908, on the motion of the plaintiff for judgment on the verdict (rendered February 21, 1908), it appeared that no suggestion was made to the court of the defendant's bankruptcy proceedings until March 2, 1908, which was after the verdict of the jury (February 21, 1908), though in the defendant's suggestion of bankruptcy it is alleged that the discharge had been granted on July 9, 1907, — see 182 Mass. 360. It did not appear at the hearing that the discharge would have been a bar to the action if it had been pleaded.

"Motion for judgment allowed."

The defendant appealed from the order denying the defendant's motion to be allowed to file a supplemental answer and from the order allowing the plaintiff's motion for the entry of judgment.

D. B. Beard, (*H. A. Eyges* with him,) for the defendant.

W. Hirsh, pro se.

HAMMOND, J. All the material questions raised in this case are settled in *Lane* v. *Holcomb*, 182 Mass. 360. The fact that there was a declaration in set-off is immaterial. It was within the discretion of the court to allow or disallow the motion to amend the answer. And the order for judgment was correct.

Judgment affirmed with double costs.

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HENRY J. BOWIE *vs.* COFFIN VALVE COMPANY.
SAME *vs.* FITCHBURG STEAM ENGINE COMPANY.

Suffolk. November 17, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Agency. Master and Servant. Evidence*, Opinion: experts.

If a man, who theretofore has been employed as a machinist's helper and never has worked in hoisting heavy castings into place in setting up a stationary steam engine, is sent to help in such work under the immediate supervision of a superintendent, and, with another man, is ordered to hoist a heavy casting by pulling the chain of a fall, he has a right to assume, while obeying this order, that sufficient precaution has been taken to prevent the casting as it rises from the ground from swinging in too quickly before being lowered to its final position, and he is not negligent as matter of law in failing to appreciate fully the danger that a fellow servant in charge of a guy rope attached to the casting may be unable to prevent the rope from slipping and the casting from swinging forward so rapidly as to strike him before he can get out of the way; nor does he assume the risk of such an accident.

In an action by a workman against a corporation manufacturing and undertaking to set up stationary steam engines, by which he was employed, without previous experience, to help in setting up such an engine under the personal supervision of a superintendent, for personal injuries from a heavy casting swinging upon him when in obedience to the order of the superintendent he with another workman had begun to hoist it by pulling on the chain of a fall for the purpose of setting it in place, where it appears that the selection and use of the appliances, their proper adjustment, the method of operation and the number of men who should be at the fall and of those managing the guy rope attached to the casting were all within the supervision and control of the superintendent who gave the order, if there is evidence that the accident was caused by the fact that only one man was at the guy rope and was unable to prevent it from slipping so that the casting swung forward rapidly and struck the plaintiff before he could get out of the way, it is a question for the jury whether the superintendent was negligent in failing to provide a sufficient number of men to steady the load or in failing to adopt a different method of hoisting.

If an engine company makes a contract to deliver a stationary steam engine to a valve company and to supply a man to superintend the erection of the engine ready for steam connections, turning it over in running order, the valve company agreeing to pay the expenses of the man thus sent and to furnish "laboring help as needed," and if in pursuance of this contract the engine company sends a man who acts as its representative in superintending the setting up of the engine, a workman of the valve company, who is told by the general manager of the valve company to help the superintendent sent by the engine company and to obey his orders in whatever he wants done and thereupon proceeds with other men to work under the orders of such superintendent in setting up the engine, becomes while doing so the servant of the engine company, and that

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company owes him the duty of competent superintendence and is liable to him for injuries caused by its superintendent's negligence.

In an action by a workman against an engine company, by which he was employed to help in setting up a stationary steam engine, for personal injuries from a heavy casting swinging upon him, when in obedience to the order of the superintendent in charge he with another workman had begun to hoist the casting by pulling on the chain of a fall for the purpose of setting it in place, upon the question of fact whether one man at the guy rope attached to the casting would be sufficient to prevent the casting as it was being raised into position from swinging in too rapidly toward the base where it was to rest, it is within the discretion of the presiding judge whether to admit the opinion of an expert as an aid to the jury or whether to exclude the expert testimony and to leave the question, in regard to such a simple mechanical operation not requiring technical skill, to be passed upon by the jury in the light of their common knowledge.

TWO ACTIONS OF TORT by the same plaintiff, the first against the Coffin Valve Company and the second against the Fitchburg Steam Engine Company, each of the defendants being a corporation, for personal injuries received by the plaintiff on April 21, 1904. Writs dated October 3, 1904.

In the Superior Court the cases were tried together before *Richardson*, J. From the evidence it appeared that the plaintiff entered the employ of the Coffin Valve Company on or about April 10, 1904. The plaintiff testified as follows: "That he was a steamfitter's helper and that on or about April 21, 1904, he was working for the Coffin Valve Company as a machinist's helper, or a general man helping the worker, and that his foreman was one Masters, who was also employed by the Coffin Valve Company, and that he took his orders from Masters; that on the morning of the accident one Chadbourne, the general manager of the Coffin Valve Company, took the plaintiff from Masters and gave him to a man called Daniels, and Chadbourne told the plaintiff to help this man, whatever he wanted the plaintiff to do under his charge; that the plaintiff went with Daniels to the engine room of the Coffin Valve Company and that an engine was sitting there on the base and a few fixings which the plaintiff did not know much about; that they put skids under the engine and levelled it up; that the plaintiff took his orders from Daniels; that Daniels gave all the orders to the rest of the men there; that Daniels ordered the plaintiff and other men to go after a set of chain falls and that afterwards the plaintiff helped in rigging them up, as much as he knew, and that Daniels was in charge of all the men in the

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gang and that so far as plaintiff knew no one else gave instructions as to the way and manner the engine was to be set up except Daniels; that the plaintiff was put to work by Daniels to help a man on the falls, the falls being hitched to the casting or half of the fly wheel, that was to go in the pit; that the falls were used to raise the casting on its bearing by pulling on the pulley and that would lift this casting up; that the casting consisted of half the fly wheel, and that it was to be put over and turned the other side from which it was sitting and it was to run in the pit; that the casting was seven feet in diameter and the weight was from two thousand to twenty-three hundred pounds." The plaintiff further testified "that the falls were set so as to swing the casting nearly over to the place where it was to be set up; that then it would be lowered down and the falls would be taken off it before we would take hold of it by our hands, as I understood it, but that the plaintiff did not know much about it at that time; that when the casting was lifted it was not evident to his mind that it was going to swing, he having worked at that kind of business only three days; that Daniels directed one McAvinnay and the plaintiff to lift this piece of casting; that Daniels fastened a rope to the fly wheel or casting and put it out through a window and sent one Wilburt to hold the rope against the corner of the window to prevent the fly wheel from coming forward too quickly when it was raised off the skids; that the plaintiff and McAvinnay were pulling on the falls, by the direction of Daniels, about ten feet from the casting and facing it, and when we were directed to pull, as it raised off, I understood Daniels to say to Wilburt outside, to slacken away on the rope through the window, and, as he slackened away, the casting came so swiftly that it caught my leg; that it swung so swiftly that it was impossible for me to clear the casting coming; that I tried to get out of the way but could not; that it caught my ankle causing the injuries complained off and that this was the first half of the fly wheel that they were putting in position." There was other testimony regarding the accident given by the plaintiff and by other witnesses.

The plaintiff offered as an expert one Masters who testified that he had been employed as foreman by the Coffin Valve Company for twenty-five years, and that as such he had superin-

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tended the lifting of similar weights almost daily in his place of business and had rigged pulleys for the purpose of lifting them and had attached ropes to the weights to hold them from moving while suspended in air, in a way similar to that in which the work was being done at the time the plaintiff was injured.

The counsel for the plaintiff then asked the following question: "Assuming that you have got a load here which is a half of a fly wheel, which weighs between two thousand and twenty-three hundred pounds, assuming that this is within eight or ten feet from a perpendicular line drawn to a point overhead some ten feet, and that there is a chain that is attached to the centre of that portion of the fly wheel — or, if there is any question of where it was attached, we will say it was attached to that portion of the fly wheel, and that the line was drawn directly up overhead of where the plumb line would be on the ground, and that there was attached to that casting here a rope which went out some twenty feet to a window and the distance is about twenty feet to where the window was and that the man was standing there, with a rope attached to the casting, getting out of the window some five feet outside, and has no other way of holding that casting when it leaves the ground except by his hand, hanging on to the rope against the jamb of the window and after the casting leaves the ground, two or three inches above the skids, would the man, using no other method, be able to hold that weight from going towards the centre?" This question was objected to, and the judge said, "If you can estimate the strength required in horse power, you may do it." To this ruling the plaintiff excepted.

When the plaintiff rested his case the defendant Coffin Valve Company also rested on the evidence offered by the plaintiff.

The defendant Fitchburg Steam Engine Company introduced in evidence a contract in writing between the Fitchburg Steam Engine Company and the Coffin Valve Company, of which the following abstract was printed in the bill of exceptions as the only part of the contract material to the issue in the case:

"We [the Fitchburg Steam Engine Company] will furnish foundation plan and deliver the engine on cars here supplying man's time for three days, or less, to superintend the erection of engine ready for steam connections and, if connections are made

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without delay, to start engine under steam, turning it over to you in running order you paying his expenses and furnishing laboring help as needed, all for the sum of thirteen hundred fifty and no one hundredths ($1350) dollars and will allow you for your 9 × 18 engine f. o. b. here $360.00 in as good condition as now, fair, wear and tear considered. Ninety ($90.00) dollars when engine is shipped and notes at sixty (60), ninety (90), one hundred twenty (120) and one hundred fifty (150) days for two hundred twenty-five dollars (225.00) each from date of shipment each having interest added after thirty (30) days from its date, thus giving five months time from shipment, for payment."

The defendant Fitchburg Steam Engine Company called as its only witness Chadbourne, the superintendent of the Coffin Valve Company mentioned above as the general manager of that company, who testified that Daniels was sent by the Fitchburg Steam Engine Company, and was received by the Coffin Valve Company under the terms of this contract; that the engine had been shipped from Fitchburg and the witness did not know whether or not the contract price of the engine had been paid; that the engine had been unloaded from the cars in Neponset at the factory of the Coffin Valve Company by the workmen of the Coffin Valve Company, and that the various parts had been placed in the engine room; that Wilburt, McAvinnay and the plaintiff all received their pay from the Coffin Valve Company in the regular course of its business; that the Coffin Valve Company built the bed on which the engine was to rest; and that one Perry, a foreman of the Coffin Valve Company, gave Daniels directions where to set up the engine but did not give him any directions as to the details of setting it up; that Daniels superintended the erection of the engine; that Perry came there occasionally and looked at the engine; that he did not talk with the workmen at all but that he spoke once or twice with Daniels; and that Daniels stayed there until the engine was completely set up.

The evidence also tended to show that no part of the apparatus used in lifting the fly wheel broke or gave way during the operation.

At the close of all the evidence the judge ordered a verdict

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for the defendant in each case; and the plaintiff alleged exceptions, which by agreement were allowed in one bill of exceptions applying to both cases.

S. A. Fuller, (*C. Toye* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the Coffin Valve Company.

F. W. Fosdick, for the Fitchburg Steam Engine Company.

BRALEY, J. These actions of tort were tried together, and a verdict having been ordered in favor of both defendants the cases are before us on a single bill of exceptions. The pleadings contain two counts at common law and two under the statute, but, as the plaintiff relied only upon the third count charging negligence of some person intrusted by the defendants with superintendence, the other counts are immaterial. The question for decision is whether there was any evidence which would warrant a verdict for the plaintiff against either or both defendants.

Independently of the inquiry as to which one of the two was his master at the time of the accident, each defendant contends that the plaintiff was not in the exercise of due care, and that he assumed the risk. But his general employment had been that of a machinist's helper, and he never had worked in the manner described in hoisting into place heavy castings while setting up a stationary steam engine. If, in connection with his inexperience in this particular line of service, there is taken into consideration the additional facts, that the work was done under the immediate supervision of a person who could have been found to have been acting as superintendent, and that when directed to pull upon the chain falls he had the right to rely upon the presumption that sufficient precaution had been taken to prevent the casting, or section of the fly wheel, as it rose from the ground from swinging in too quickly as it was lowered into final position, the jury could find, that, being at work in his appointed place under the eye of his master's representative, he was not guilty of contributory negligence, if he failed to appreciate fully the danger that his fellow servant in charge of the guy rope might be unable to prevent the rope from slipping and the load from swinging so rapidly forward as to strike him. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. *Meagher* v. *Crawford Laundry Machinery Co.* 187 Mass. 586, 589, and cases cited. *Connolly* v. *Booth*, 198 Mass. 577. *Robertson* v. *Hersey*, 198 Mass. 528.

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If there was evidence for the jury on this issue, the defendants urgently insist that they severally are without fault. But the jury would be warranted in finding that one Daniels, to whom was delegated the sole charge of erecting the engine, and whose orders the plaintiff was directed to obey, was acting as superintendent within the meaning of the statute. *Jordan* v. *New England Structural Co.* 197 Mass. 43. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 18. *Baldwin* v. *American Writing Paper Co.* 196 Mass. 402. The selection and use of the appliances, their proper adjustment, the method of operation and the number of men who should be at the falls, or managing the guy rope were all within his supervision and control. He was there because of his knowledge and skill to "superintend the erection of the engine, ready for steam connections." It was a matter peculiarly within his judgment to determine how many men were necessary safely to manage the rope attached to the casting, and the evidence plainly showed, or it could have been found, that either more men ought to have been directed to steady the load or a different method should have been adopted.

But, if this was sufficient to require the submission of this issue to the jury under the decisions in *Reardon* v. *Byrne*, 195 Mass. 146, and *Connolly* v. *Booth*, 198 Mass. 577, and the cases there cited, and *Di Bari* v. *J. W. Bishop Co.* 199 Mass. 254, and *Hines* v. *Stanley G. I. Electric Manuf. Co.* 199 Mass. 522, we are brought to the further question, in whose service was the plaintiff employed when injured. It was part of its contract, that the Fitchburg Steam Engine Company should set up, connect and "turn over" the engine in running order. In performance of this part of the contract, it sent Daniels. Upon the uncontradicted evidence he was there and was acting not as the representative of the vendee but of the vendor. In the prosecution of the work, he alone gave the necessary orders, which were obeyed by the men, including the plaintiff, all of whom had been furnished by the vendee. He was vested with the power of control, and the scope of his authority included everything which properly might be required for the installation of the engine, even if his expenses were to be borne by the Coffin Valve Company, which also was to furnish at its own expense such "laboring help as

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needed." If while performing this particular service the plaintiff voluntarily subjected himself to the commands of Daniels and became the servant of the Fitchburg Steam Engine Company, then under the statute it would owe to him the duty of competent superintendence. *Delory* v. *Blodgett*, 185 Mass. 126. *Ouligham* v. *Butler*, 189 Mass. 287, 290, 291. *Haskell* v. *Boston District Messenger Co.* 190 Mass. 189, 193. Before the contract had been introduced, there was no evidence that Daniels was present as its representative, but, after the contract had been put in, it was a question of fact whether the plaintiff knew he was working for an independent contractor and consented to the transference. Unless this was found, the relation had not been established, for he could not be transferred from one master to another without his consent either expressly given or implied from the nature and character of the work when compared with his ordinary employment. *Driscoll* v. *Towle*, 181 Mass. 416, 418. *Heffernan* v. *Fall River Iron Works Co.* 197 Mass. 28.

But, if the case against this company should have been submitted to the jury, it does not follow that a verdict in favor of the Coffin Valve Company was ordered rightly. This defendant rested on the testimony offered by the plaintiff. The contract had not been put in evidence, and no discussion is called for to make plain what is evident upon the record, that, as the case then stood, the jury could have found that Daniels was in its service, and had been intrusted with superintendence. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 18, 21. *Baldwin* v. *American Writing Paper Co.* 196 Mass. 402, 408. The verdict, therefore, as to this defendant also must be set aside, and, as there must be a new trial, the exceptions to the exclusion of the question asked of the plaintiff's expert should be considered. The inquiry of fact was whether one man at the rope would be sufficient to prevent the casting, as it was being raised into position, from too rapidly swinging in toward the base where it was to rest. While it might have been admitted in the discretion of the presiding judge, if he thought the jury would be aided by the expert's opinion, yet, from their common knowledge of what at most was a simple mechanical operation not involving technical skill, they were fully competent to decide this for themselves.

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Prendible v. *Connecticut River Manuf. Co.* 160 Mass. 131.
Meehan v. *Holyoke Street Railway Co.* 186 Mass. 511, 514.
Erickson v. *American Steel & Wire Co.* 193 Mass. 119, 126.
Whalen v. *Rosnosky*, 195 Mass. 545, 547.

Exceptions sustained.

GEORGE G. PETERS *vs.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Suffolk. December 2, 3, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, For an accounting, Fraud. *Insurance*, Life. *Conflict of Laws*. *Equity Pleading and Practice*, Demurrer.

A bill in equity against an insurance company by the holder of a policy of life insurance issued by the company contained the following allegations: That the policy provided that, at the expiration of a period of time called the tontine dividend period, all surplus of profits derived from similar policies which should not then be in force should be apportioned equitably among such policies as should have completed such periods, and that thereupon the plaintiff should have the option "to withdraw in cash this policy's entire share of the assets, i. e. the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to his policy, or to use his share in payment for future insurance; that the tontine dividend period as to the plaintiff's policy had passed, that the defendant had not equitably apportioned the surplus due to the plaintiff and had not furnished him any accounting as to such fund, but that it had refused to do so. There were also allegations, sufficiently specific, as to fraud, dishonesty, and wrongful misappropriations by the defendant in the management of the tontine fund. There was no averment that the plaintiff had exercised his option as to the disposition of the share of the assets that had been or should be allotted to his policy. The bill prayed that the defendant be ordered to account, that the share which should be apportioned to his policy be ascertained and paid to him, and that the damages sustained by him be assessed and paid to him. The respondent demurred. *Held*, that, under the allegations as to fraud, dishonesty and wrongful misappropriations by the defendant, the plaintiff had a right, before he exercised the option given him in the policy, to maintain his bill in order to ascertain what was equitably due to him under the terms of his policy.

While it is true that a bare charge, contained in a bill in equity against a life insurance company by the holder of a policy issued by the company, that the defendant or its officers had been guilty of fraud which lessened the amount which equitably should have been paid to the plaintiff under the terms of the policy, without the acts of fraud being specified, would not be sufficient for the

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maintenance of the bill on the ground of such fraud, nevertheless the following allegations would be sufficient: That the defendant paid to its executive officers unnecessarily large and exorbitant salaries, improperly and unlawfully paid large sums of money as contributions for the campaign expenses of both of the two leading political parties, had invested its funds in large office buildings in bad faith and from dishonest motives, valuable portions of which buildings were rented to its officers and their relatives at prices much below their true rental value, managed its deposits in a way to benefit certain banking institutions whose officers were also officers of the defendant, participated with its funds in various speculative enterprises, whose securities officers of the defendant sold to it at exorbitant prices to their own profit, and expended large sums of money improperly in public entertainments.

A demurrer to a bill in equity against a life insurance company by the holder of a policy therein seeking an accounting and alleging that under the provisons of the policy the defendant had agreed to "apportion equitably" to the plaintiff the share of his policy in a certain fund and that such equitable apportionment had not been made, but that the defendant had refused to render to him an accounting of its use of such fund and had fraudulently and dishonestly misappropriated and mismanaged it, will not be sustained for lack of an allegation showing that the damage sustained by the plaintiff from the alleged wrongful acts of the defendant was not too small to warrant equity in interfering.

Whether, when a life insurance company makes an apportionment at the end of the tontine dividend period to the holder of a policy containing a provision that at the end of such period of the policy the insured shall have the option "to withdraw in cash this policy's entire share of the assets, i. e. the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to the policy, or to use his share wholly or in part in payment for further insurance, such apportionment is *prima facie* correct and not to be overthrown without evidence of fraudulent conduct on the company's part affecting the result, or at least of some error in the manner of making the apportionment or in the principles upon which it was based, was not decided in this case, which came before the court on demurrer to a bill in equity by a policy holder seeking an accounting from the insurance company, since the bill contained allegations, sufficiently specific, of fraudulent conduct on the part of the company in the management of its funds.

Where a bill in equity is based upon a contract made in another State and governed by the law of that State, but contains no allegations as to the laws of that State, the question, whether under such law the contract is enforceable by the bill in equity, cannot be raised by demurrer.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on September 4, 1906, and amended on September 12, 1908.

The case was before this court on an appeal by the defendant from an order denying a motion by the defendant to dismiss the bill. A decision affirming the order was reported in 196 Mass. 143. After the issuing of the rescript, the bill was amended by adding as specifications regarding the allegations of lack of honesty, care and prudence on the part of the defendant

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in the management and investment of the tontine fund, the following:

"1. That the defendant has, during each year while the plaintiff's policy was in force, paid to its executive officers unnecessarily large and exorbitant salaries, including salaries of $100,000 per annum to its president and its vice-president, and has, in each of those years, paid much larger sums than were reasonable or proper as fees to its directors, these fees amounting, in each year, to more than $40,000.

"2. That the defendant has, in each of said years, improperly and unlawfully paid large sums of money as contributions to the national campaign funds of the republican and democratic parties, and also to the campaign funds of both those parties in the State of New York.

"3. That the defendant and its officers and directors have, in each of said years, acted improvidently, fraudulently, and dishonestly in the investment of the funds of the corporation, including both the 'reserve' and the 'surplus,' in that they have neglected to invest said funds in a safe and profitable manner, whereby the greatest benefit might be derived therefrom by the society and the policy holders, including the plaintiff, but, on the contrary, have invested said funds in unsafe and unprofitable business ventures, in order that large profits might be made both directly and indirectly by said officers and directors for themselves.

"4. That the defendant has, while the plaintiff's policy was in force, invested a very large proportion of its assets, including both 'reserve' and 'surplus,' amounting in all to about $37,884,000 in large office buildings, situated in fifteen cities in various parts of the world, including New York, Boston, and St. Louis; that these investments were made in bad faith and from dishonest motives; are such as would not have been made by reasonably prudent and honest men, and that they have proved highly unprofitable to the society; that the failure of these investments to return reasonable profits to the society has been largely due to the dishonest management of the buildings, and particularly to the fact that valuable portions of these buildings have been rented to the officers and directors of the defendant, or to their relatives or friends, or to corporations in which

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they were financially interested, at prices much below their true rental value.

"5. That the defendant has, during each of said years, kept much greater sums of money than was reasonable or proper on deposit in banking institutions, receiving therefor much lower rates of interest than might otherwise have been obtained, and that this has been done in order to benefit these institutions, in which the officers and directors of the defendant have been financially interested, to the detriment of the society.

"6. That the defendant has, during each of said years, wasted and lost large amounts of its funds, including both 'reserve' and 'surplus,' by participation in various syndicates and other speculative enterprises for the purchase and sale, or underwriting, of securities; and that the officers and directors of the defendant have made large profits at the expense of the society by selling to it at exorbitant prices, securities owned or underwritten by syndicates of which said officers and directors were themselves members.

"7. That the defendant has, during the life of the plaintiff's policy, improperly expended large sums of money in public entertainments."

Other material allegations in the amended bill are summarized in the opinion.

The defendant demurred and alleged as causes of demurrer the following:

"1. The plaintiff has not in his bill made or stated any such case as entitles him to the relief prayed for, or to any relief against the defendant as to the matters contained in the said bill, or any of such matters.

"2. The plaintiff has a plain, adequate and complete remedy at law.

"3. The necessary parties are not before the court.*

"4. The plaintiff is not entitled to an order directing the defendant to furnish him an account showing in detail its dealings with the dividends, if any, upon the plaintiff's policy,

* In its brief, the defendant stated as to this cause of demurrer: "In view of the decision of the Pierce case with regard to parties, the defendant has not argued the necessity of joining other parties, but does not thereby waive its insistence on such necessity."

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retained by it, and with the fund, if any, in which the plaintiff is entitled to share, or with the interests and profits on said funds, or with the accumulations thereof.

"5. Upon the facts alleged in the bill, the plaintiff is bound by the apportionment of the tontine fund made by the defendant, and is not entitled to have the amount of his share, if any, of the surplus ascertained by the court, or to a decree that such amount so ascertained shall be paid over to him by the defendant.

"6. The plaintiff has not alleged with sufficient definiteness and specification the facts tending to show that the defendant has not dealt honestly, or with due care, with the tontine fund, and has appropriated and wasted the same, as alleged in the eighth paragraph of the plaintiff's bill as amended, so as to entitle the plaintiff to any relief therefor.

"7. It does not appear that the plaintiff, on June 9, 1906, or at any time, made any election of the options given in paragraph five of the 'provisions and requirements' stated in the policy dated September 8, 1886.

"8. It does not appear from the facts set forth in the bill as amended that the relief prayed for by the plaintiff is of a nature or in an amount sufficient to invoke the powers of a court of equity."

The demurrer was heard and overruled by *Hammond*, J. The defendant appealed and, at the request of the defendant, the presiding justice reported the case for determination by the full court.

G. R. Nutter, for the defendant.

T. Hunt, for the plaintiff.

SHELDON, J. Material parts of the agreement which the defendant, by its policy of insurance, made with the plaintiff, were in substance that on the expiration of the tontine dividend period all surplus of profits derived from similar policies which should not then be in force should be apportioned equitably among such policies as should complete their tontine dividend periods, and that thereupon the plaintiff should have the option "to withdraw in cash [his] policy's entire share of the assets, i. e. the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to his policy, or to use his share wholly or in part in payment for future insurance. The plain-

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tiff's policy has completed this dividend period; but he avers that the defendant has not equitably apportioned the surplus due to him under the terms of the policy, that it has not furnished him a sufficient account or any account, or produced any such account, but has refused to do so, that it has not dealt honestly with the dividends retained by it, that it has misappropriated and wasted such dividends, and has failed to manage the tontine fund or its accumulations or the general business of the company honestly, carefully or prudently. And by an amendment to the bill he has charged certain specific acts and kinds of mismanagement and of wrongful, dishonest and fraudulent conduct which he avers have been committed by the defendant and its directors in the management and investment of its funds. There is no averment in the bill that the plaintiff has exercised his option as to the disposition of the share of the assets that has been or should have been allotted to his policy. He asks that the defendant be ordered to furnish him with an account; that the amount to which he is fairly entitled may be ascertained, and that such amount be paid to him; and that the damages sustained by him be assessed and ordered to be paid to him.

Some of the general questions raised by the defendant's demurrer to this bill have been already considered in *Pierce* v. *Equitable Assurance Society*, 145 Mass. 56, and in the decision made upon the defendant's objections to the right of this court to entertain this case reported in 196 Mass. 143. It is true, as was said in the Pierce case, *ubi supra*, that the relation between the defendant and the plaintiff is not that of trustee and *cestui que trust*, but that of debtor and creditor. This rule is now well settled in the courts. See besides the decisions referred to in the Pierce case (145 Mass. at p. 59), *Peters* v. *Equitable Assurance Co.* 196 Mass. 143, 148, 149; *Uhlman* v. *New York Ins. Co.* 109 N. Y. 421; *Brown* v. *Equitable Assurance Society*, 142 Fed. Rep. 835; *Everson* v. *Equitable Assurance Society*, 68 Fed. Rep. 258. But under the allegations of this bill the plaintiff is entitled to know before exercising the option given to him what is the amount of his policy's share of the assets, including the accumulated income and the surplus apportioned by the defendant to his policy, especially in view of the defendant's express agreement that all surplus of profits from policies like his "shall be

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apportioned equitably" among the policies which shall complete their dividend periods. *Pierce* v. *Equitable Assurance Society*, 145 Mass. 56. He cannot wisely exercise his option until he shall have received this information. Upon the averments of the bill, under R. L. c. 159, § 3, cl. 6, the plaintiff has a right to come into equity, and to have such an accounting, unless some of the defendant's specific objections to the maintenance of the bill can be sustained.

The defendant's contention is that irrespective of the allegations of fraud this bill will not lie for an accounting; that in the absence of fraud the plaintiff is bound by the apportionment of the surplus made by the defendant; and that the bill does not contain such allegations of fraud or irregularity as to justify a court of equity in reviewing the apportionment made by the defendant.

1. In reference to the first contention of the defendant, we need not consider whether we should now follow all of the reasoning in *Pierce* v. *Equitable Assurance Society*, or rather should adopt the defendant's contention that the plaintiff's only right to compel an accounting from the defendant is incidental to the enforcement of some legal claim against it, and that until the exercise of his option as to what he will require from the defendant he has no such legal claim; that there is not shown to be at present any obligation on the part of the defendant to render an account to the plaintiff either by reason of the relationship between them or because of any provision in the policy or the language of any statute. *Brown* v. *Equitable Assurance Society*, 142 Fed. Rep. 835, 842. *Everson* v. *Equitable Assurance Society*, 68 Fed. Rep. 258, and 71 Fed. Rep. 570. *Hunton* v. *Equitable Assurance Society*, 45 Fed. Rep. 661. *Greeff* v. *Equitable Assurance Society*, 160 N. Y. 19, much of the reasoning in which may be applied to this case, although the stipulations of the policy there considered were not the same as are now before us. There is very much force in what was said by Peckham, J., in *Uhlman* v. *New York Ins. Co.* 109 N. Y. 421, 434, as to the consequences that would follow if every policy holder of a class like this had the right to call the defendant to account "and to cause it to give in the trial of the action a detailed account of every transaction (proved by reference to or the production of its

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books, and by the oaths of its officers) which took place from the commencement to the termination of the tontine period in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less even the slightest *prima facie* proof of wrongdoing or that there had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action and a right to demand this proof from the defendant. . . . That this should be permitted without an allegation, even on information and belief, that any fraud, mistake or impropriety in the accounts or in the manner of their statement had been made by the officers or agents of the company would seem to be intolerable." This was said, however, in a case in which the plaintiff had abandoned all allegations as to any misappropriation of the funds or any wrongdoing in regard thereto, and claimed a right to an accounting from the mere nature of the transaction as shown by the policy. It well may be that this plaintiff would not be allowed to have the accounting for which he asks without first offering proof of his averments of fraud on the part of the defendant. But it is generally agreed that such an accounting would not be denied where there had been actual wrongdoing and fraudulent misappropriation of the assets that should have been accounted for and apportioned. This is either expressly declared or assumed in *Greeff* v. *Equitable Assurance Society*, 160 N. Y. 19; *Uhlman* v. *New York Ins. Co.* 109 N. Y. 421; *Watts* v. *Equitable Assurance Society*, 55 N. Y. Misc. 454; *Brown* v. *Equitable Assurance Society*, 151 Fed. Rep. 1; *Gadd* v. *Equitable Assurance Society*, 97 Fed. Rep. 834; *Everson* v. *Equitable Assurance Society*, 68 Fed. Rep. 258, and 71 Fed. Rep. 570; and *Bain* v. *Ætna Ins. Co.* 20 Ont. 6.

The bill before us expressly charges such fraud, dishonesty and wrongful misappropriation; and the amendment at least makes these allegations sufficiently specific to call for an answer. The bare charge that the defendant or its officers had been guilty of fraud would not of course be sufficient without setting out the facts which constituted the fraud relied on. *May* v. *Wood*, 172 Mass. 11. *Blair* v. *Telegram Newspaper Co.* 172 Mass. 201,

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203, 204. *Garst* v. *Hall & Lyon Co.* 179 Mass. 588, 590. *Nye* v. *Storer*, 168 Mass. 53, 55. *Tetrault* v. *Fournier*, 187 Mass. 58, 62. But any deficiency in this respect in the original averments of the bill is cured by the amendment. *Brown* v. *Equitable Assurance Society*, 151 Fed. Rep. 1. The allegations as amended go further than those which were held to be insufficient in *Blair* v. *Telegram Newspaper Co.* 172 Mass. 201, 204. Such dishonesty as is charged, directly diminishing the fund from which an apportionment was to be made to the plaintiff's policy, was necessarily injurious to him; and the rule stated in *Lewis* v. *Corbin*, 195 Mass. 520, 524, is not to be applied. Nor is it now material that the plaintiff has not limited the extent of his possible recovery by expressly averring the amount of his damages, and that these may turn out to be too small to warrant equity in interfering, within the rule of *Giragosian* v. *Chutjian*, 194 Mass. 504, 507, and cases cited. There is no presumption that this will be the case; if it should so turn out, the defendant will have the benefit of it.

2. As to the defendant's second contention, the weight of authority elsewhere undoubtedly is against the dictum in *Pierce* v. *Equitable Assurance Society*, 145 Mass. 56, 58, 59, and is to the effect that the apportionment made by the defendant is *prima facie* correct, and is not to be overthrown without evidence of fraudulent conduct on its part affecting the result, or at least of some error in the manner of making the apportionment, or in the principles upon which it was based. *Greeff* v. *Equitable Assurance Society*, 160 N. Y. 19. *Uhlman* v. *New York Ins. Co.* 109 N. Y. 421. *Buford* v. *Equitable Assurance Society*, 98 N. Y. Supp. 152. *Gadd* v. *Equitable Assurance Society*, 97 Fed. Rep. 834. *Everson* v. *Equitable Assurance Society*, 68 Fed. Rep. 258, and 71 Fed. Rep. 570. *Bain* v. *Ætna Ins. Co.* 20 Ont. 6. But we need not further consider this question; for the fact that such fraudulent conduct is expressly charged in the bill makes it impossible to sustain the demurrer for this reason.

3. The contention that the bill as amended does not contain such allegations of fraud or misconduct as to warrant equity in interfering has been already sufficiently considered.

It may be added that while there is ground for the contention that this policy is a New York contract, to be governed by the

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laws of New York, we have not felt at liberty to consider whether this action can be maintained under those laws. What those laws are is of course a question of fact in this jurisdiction, and cannot be considered upon demurrer to a bill which contains no allegation as to the New York laws.

Demurrer overruled.

J. FRANK ADAMS, trustee, *vs.* HENRY G. YOUNG & another.

Suffolk. December 3, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Master, Master's report, Exception to master's report. *Sale of Merchandise in Bulk. Subrogation. Mortgage*, Of personal property. *Marshalling. Equity Jurisdiction*, To set aside sale of merchandise in bulk.

While it is true that in a suit in equity an exception to a master's report, which is based upon an objection to the master's making a ruling of law that upon the facts reported by him the plaintiff was entitled to no relief against the defendant, is well taken as an abstract proposition, it becomes immaterial where it appears that all the facts are reported by the master.

An insolvent mercantile corporation, the stock in trade in whose store was subject to two mortgages, the second of which covered not only the property then in the store but also "all other goods and supplies . . . hereafter contained in" the store, sold its stock in trade in bulk and not in the usual course of trade to one with whom it agreed that out of the purchase price it would at once pay the amounts due on the mortgages, and the purchaser paid to the corporation $1,725 in two checks, one for $1,500, the amount due on the mortgages, and the other for $225. The corporation at once indorsed and delivered the $1,500 check to the mortgagee, who forthwith discharged the first mortgage and assigned the second and the note which it secured to the purchaser, who immediately took possession of all of the stock in trade. Both the corporation and the purchaser acted in good faith and with no actual intent to defraud the corporation's creditors. None of the requirements of St. 1908, c. 415, regarding sales of merchandise in bulk, were complied with. Thereafter the corporation was adjudged bankrupt and a trustee was appointed, who sought by a bill in equity to gain possession of the stock in trade formerly of the corporation. The trustee had not offered, and there was no offer in the bill, to pay to the purchaser what he had paid on the mortgages. *Held*, that the purchaser, having acted in good faith, was subrogated to the rights of the mortgagee, and was not prevented from enforcing the rights thus obtained by the constructive fraud which, according to St. 1908, c. 415, he had committed; and that therefore the bill must be dismissed.

The general doctrine, that the equitable rule of marshalling assets for the protection of a junior creditor by compelling a senior creditor to resort first to a fund or security which the junior creditor cannot reach, will be confined to cases,

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where two or more persons are creditors of the same debtor and have successive liens upon the same property while the creditor prior in right also has other security belonging to the same debtor and not available to the holder of the junior lien, and will not be enforced to the detriment of the prior creditor.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk on October 17, 1905, by the trustee in bankruptcy of E. M. Wheeler and Company, Incorporated, alleging that that corporation before it was adjudged a bankrupt had undertaken to convey in bulk to the defendants its stock of drugs located in its store on Beacon Street in Brookline, "the same being the entire stock in trade of" the corporation, and that the sale and conveyance were void as against the corporation's creditors and the plaintiff because the requirements of St. 1903, c. 415, were not complied with.

The case was referred to a master, who found and reported the following facts: On March 29, 1904, the corporation mortgaged the furniture, fixtures and stock in trade then in its Beacon Street store and also the furniture, fixtures and stock in trade in a store it owned on Dorchester Avenue, to one Dart to secure a loan of $1,200. On May 2, 1904, it also made a mortgage to Dart of all the personal property which it owned at the Beacon Street property "and all other goods and supplies now or hereafter contained in" that store.

A few days before June 10, 1904, Dart by his agent took possession under the terms of his mortgages of the property in the Beacon Street store. There was then due $600 on the first and $900 on the second mortgage. Thereafter the corporation entered into negotiations with and finally sold to the defendants their entire stock in trade for $2,500, it being agreed that out of the purchase price the corporation should pay the mortgages on the property and also $775 due under a contract of conditional sale of a soda water fountain and carbonator.

The defendants gave a check for $1,500 of the purchase price to the corporation, which it at once indorsed to Dart, who by his duly authorized attorney at once discharged the first mortgage and assigned to the defendants the second mortgage and the note secured thereby.

Of the balance of the purchase price, the defendants paid the $775 which was due on the purchase price of the soda water

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fountain and carbonator, and paid $225 to the secretary of the corporation, who applied it to take up an indebtedness of the corporation to himself and to an attorney.

At the time of the transactions between the corporation and the defendants, the corporation was insolvent. Neither the corporation nor the defendants at the time knew of St. 1903, c. 415, and none of its requirements were complied with. The corporation and the defendants "acted in good faith and with no actual intent to defraud creditors; and [the defendants] are to be charged with such fraud and such fraudulent intent only as their failure to comply with the statute necessarily imputes."

Other facts reported by the master are stated in the opinion.

The report closed as follows: "Upon the foregoing facts I rule that the plaintiff is entitled to no relief against the defendants."

The plaintiff excepted to the master's report "(1) in that he rules that the 'plaintiff is entitled to no relief against the defendants,' the master having no authority to make any ruling of law whatsoever; — (2) because said ruling is not warranted by the facts stated in said report."

The case thereupon was heard by *Fox*, J., who overruled the exceptions to the master's report and dismissed the bill; and the plaintiff appealed.

O. Storer, for the plaintiff.

F. E. Bradbury, for the defendants.

SHELDON, J. The plaintiff's first exception, to the master's ruling that the plaintiff was entitled to no relief against the defendant, was well taken as an abstract proposition. As stated in *Clark* v. *Seagraves*, 186 Mass. 430, 435, a master's duty is to find the facts, and it is for the court to say upon these facts whether any and what relief should be given. But as all the facts are reported by the master, and the only question now raised is as to the rights of the plaintiff upon these facts, this exception becomes really immaterial and need not be considered.

The sale made by the Wheeler Company to the defendants was doubtless as to the stock of goods sold, though not as to the furniture and fixtures, within the inhibition of St. 1903, c. 415. If nothing more appeared, the plaintiff would have the right to avoid that sale so far as it covered the stock in trade and to hold

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the defendants for the value of that stock. *Gallus* v. *Elmer*, 193 Mass. 106.

But we are not to disregard the master's finding that in making this sale both seller and purchasers acted in good faith and with no actual intent to defraud creditors, and that the purchasers are to be charged only with such fraud and such fraudulent intent as the failure to comply with the requirements of the statute necessarily implies. The effect of the statute is to make this non-compliance conclusive of fraud as to the creditors of the seller. *Kelly-Buckley Co.* v. *Cohen*, 195 Mass. 585. It creates a decisive badge of fraud, such as according to the decisions of some courts is found in the retention of possession by a seller after an absolute sale of property. Although the usual doctrine is that such retention of possession is merely an indication of an intent to defraud creditors, to be considered in connection with the other evidence, yet it has been held in some jurisdictions that the absence of a change of possession after a sale of personal property raises a conclusive presumption of fraud not to be overcome by evidence of the actual good faith of the parties. See for example *Hull* v. *Sigsworth*, 48 Conn. 258; *Rozier* v. *Williams*, 92 Ill. 187; *Greenebaum* v. *Wheeler*, 90 Ill. 296, 298; *Foster* v. *Grigsby*, 1 Bush, 86; *Jarvis* v. *Davis*, 14 B. Mon. 529; *Wilson* v. *Hill*, 17 Nev. 401; *Ziegler* v. *Handrick*, 106 Penn. St. 87; *Mason* v. *Bond*, 9 Leigh, 181; *Weeks* v. *Prescott*, 53 Vt. 57; *Rothschild* v. *Rowe*, 44 Vt. 389. But one whose purchase of property has for that reason been avoided by the creditors of the seller, being himself free from any actual fraud, may stand in the place of creditors whose demands he has paid out of the property or in consideration of the transfer to himself. *Loos* v. *Wilkinson*, 113 N. Y. 485. *Robinson* v. *Stewart*, 10 N. Y. 189. *Pond* v. *Comstock*, 20 Hun, 492. *Butler* v. *White*, 25 Minn. 432. Our own decision in *Crowninshield* v. *Kittridge*, 7 Met. 520, accords with this principle. So if he has paid off debts which constituted liens or incumbrances upon the property conveyed to him, he may for his protection and reimbursement take by subrogation the rights of the secured creditors whom he has thus paid. *Cole* v. *Malcolm*, 66 N. Y. 368. *Rhead* v. *Hounson*, 46 Mich. 243. *Merrell* v. *Johnson*, 96 Ill. 224. *Selleck* v. *Phelps*, 11 Wis. 380. *Tompkins* v. *Sprout*, 55 Cal. 31.

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If instead of a discharge he has taken an assignment of such a mortgage or other incumbrance, it will not be treated as merged, but will be upheld in his hands as a charge upon the property. *Crosby* v. *Taylor*, 15 Gray, 64. *Mead* v. *Combs*, 4 C. E. Green, 112. *Phillips* v. *Chamberlain*, 61 Miss. 740. *Fordyce* v. *Hicks*, 76 Iowa, 41. *Smith* v. *Grimes*, 43 Iowa, 356. So his *bona fide* purchase under a valid levy or other prior lien will give him a good title. *Lamb* v. *Smith*, 132 Mass. 574. *Arrington* v. *Arrington*, 102 N. C. 491. The merely constructive fraud of a purchaser will not prevent him from being protected in this manner, if he has not himself actively participated in the fraud. There are many cases to this effect. *Loos* v. *Wilkinson*, 113 N. Y. 485. *Robinson* v. *Stewart*, 10 N. Y. 189. *King* v. *Wilcox*, 11 Paige, 589. *Levi* v. *Welsh*, 18 Stew. (N. J.) 867. *Newman* v. *Kirk*, 18 Stew. (N. J.) 677. *Sullivan* v. *Tinker*, 140 Penn. St. 35. *McCaskey* v. *Graff*, 23 Penn. St. 321. *Jackson* v. *Summerville*, 13 Penn. St. 359. *Gilbert* v. *Hoffman*, 2 Watts, 66. *Williamson* v. *Goodwyn*, 9 Gratt. 503. *Wallace* v. *McBride*, 70 Mich. 596. *Burton* v. *Gibson*, 32 W. Va. 406. *Cook* v. *Berlin Woolen Mill Co.* 56 Wis. 643. *Grant* v. *Lloyd*, 12 Sm. & M. 191. *First National Bank of Tuskaloosa* v. *Kennedy*, 91 Ala. 470. *Pritchett* v. *Jones*, 87 Ala. 317.

The application of these principles is fatal to the maintenance of this bill. The defendants have the right to rest upon the mortgage of which they took an assignment. If it were necessary to pass upon that question, it would not be easy to avoid saying that they could rest also upon the mortgage which was paid and discharged. It was their money that paid the mortgage debts. The fact that the money passed through the hands of the mortgagor and the form of the transfer which the defendants took cannot overcome the real effect of the transaction.

Nor can the plaintiff maintain his bill to recover for the value of that part of the stock in trade which consisted of goods acquired by the mortgagor after the execution of the mortgages. Apart from the fact that the bill sets out no such claim, the master has not found that the mortgagor made any additions to his stock before the sale to the defendants, and the plaintiff does not appear to have asked for any finding upon that question. Moreover, the mortgage which was assigned to the defendants

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purported to cover after-acquired property and the defendants took possession of everything immediately after their purchase, on June 10, 1904, more than three months before the petition in bankruptcy was filed against the mortgagor. These facts gave them a good title to the after-acquired portion of the stock in trade, if there was any such portion. *Wasserman* v. *McDonnell*, 190 Mass. 326. *Chase* v. *Denny*, 130 Mass. 566. *Blanchard* v. *Cooke*, 144 Mass. 207, 225, 227. *Bliss* v. *Crosier*, 159 Mass. 498.

The plaintiff has no equity to require the defendants to resort first for the payment of their mortgage to the furniture and fixtures, which are not available to the plaintiff. It does not appear what the value of the furniture and fixtures is; and the plaintiff could have no equitable rights until the mortgage debt due to the defendants was fully satisfied. *Quackenbush* v. *O'Hare*, 129 N. Y. 485. *Taylor's appeal*, 81 Penn. St. 460. And this claim of the plaintiff rests upon the assumption that while the furniture and fixtures belong to the defendants, the stock in trade belongs in equity to the plaintiff. We do not think that in the absence of controlling equities the defendants could be required to resort first to their own property to obtain payment of an indebtedness which is secured also by property of the plaintiff. *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270. It is the general doctrine that the equitable rule of marshalling assets for the protection of a junior creditor by compelling a senior creditor to resort first to a fund or security which the junior creditor cannot reach, will be confined to cases where two or more persons are creditors of the same debtor, and have successive liens upon the same property, while the creditor prior in right has also other securities belonging to the same debtor not available to the holder of the junior lien. It will not be enforced to the detriment of the prior creditor. *Carter* v. *Tanners Leather Co.* 196 Mass. 168. *Emmons* v. *Bradley*, 56 Maine, 333. *Benedict* v. *Benedict*, 2 McCarter, 150. *Lee* v. *Swepson*, 76 Va. 173. *Robinson* v. *Lehman*, 72 Ala. 401, 404. *Peery* v. *Elliott*, 101 Va. 709.

The plaintiff has not sought to redeem the property from the mortgages held by the defendants, and has not argued that he can maintain his bill for that purpose. We need not consider

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whether this could be done. *Bushnell* v. *Avery*, 121 Mass. 148.

The decree of the Superior Court overruling the plaintiff's exceptions to the master's report, confirming that report and dismissing the bill with costs, must be affirmed.

So ordered.

HARRY J. COLE, administrator, & another *vs.* NEW ENGLAND TRUST COMPANY.

Suffolk. December 4, 1908. — January 7, 1909.

Present; KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Executor and Administrator. Probate Court. Notice. Register of Probate. Evidence, Presumptions and burden of proof. *Agency*, Existence of relation. *Estoppel.*

Where it was ordered by the Probate Court that the funds of the estate of a deceased person should be paid to one of the next of kin, and, upon such next of kin refusing to receive them, the funds were deposited under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23, by the administrator in a bank in the name of the judge of probate for the benefit of such next of kin, and the bank agreed in writing to allow interest on the sum at the annual rate of two and one half per cent and on demand to repay the principal sum with interest to the judge or his assigns, but reserved the right, upon giving ten days' notice, to reduce the rate of interest or to discontinue the payment of interest or to pay off the principal, it was *held*, that such agreement of the bank was made with the judge of probate, who was entitled to the ten days' notice before the rate of interest was changed or the interest was discontinued, and neither a letter sent by the bank on May 31 to the next of kin for whose benefit the deposit was made containing a statement that interest would be discontinued after June 1, nor a letter of the bank to the register of probate on June 14 stating a claim by the bank that the letter of May 31 to the next of kin caused the stipulated interest to cease accumulating, constituted the required notice to the judge of probate or was effectual at any time to stop the accumulation of interest.

There is no presumption that a letter, addressed by a bank to the register of probate of a certain county under his official title, which contains statements with regard to a deposit of an unclaimed portion of an estate made in the bank in the name of the judge of probate of that county under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23, by the administrator of the estate, will be given by the register to the judge.

The register of probate of a county is not an agent of the judge of probate of that county with authority to receive on behalf of the judge notices with regard to a deposit made in a bank by the administrator of an estate in the judge's name under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23, of a fund which has

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been ordered by the court to be paid to a certain person who has refused to receive it.

The mere receipt by one, who is beneficially interested in a fund deposited in a bank by a judge of probate as unclaimed funds of an estate under R. L. c. 150, § 23, of a notice which should have been given to the judge and which, if it had been given to the judge, would have caused interest to cease to accumulate on the amount so deposited, does not estop the person receiving the notice nor his administrator after his death from contending that the notice had no effect because it was not given to the judge.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk on December 5, 1907, seeking to compel the payment by the defendant to the plaintiff as administrator of the estate of Hazen V. Thompson of the balance of a deposit made with the defendant under Pub. Sts. c. 144, § 16, by the judge of probate for the county of Essex for the benefit of Thompson together "with any accumulations which may have accrued thereon."

In the Superior Court the case was heard by *Fox*, J., on an agreed statement of facts, material among which were the following:

John B. Nichols, administrator of the estate of one Samuel Thompson, late of Amesbury, tendered to Hazen V. Thompson $4,185.10, which he was entitled to receive as one of the next of kin of Samuel, but which he refused to receive. The judge of the Probate Court for the county of Essex thereupon decreed that the administrator deposit the sum with the defendant, and he did so, the defendant issuing therefor the following certificate of deposit:

"$4185.10 No. 3,009.

New England Trust Co.

No. 85 Devonshire Street, Corner Water Street.

Boston, March 23, 1887.

"These may certify, that the New England Trust Company, has received from the Hon. George F. Choate, Judge of the Probate Court of Essex County, Mass., thro' John B. Nichols, Administrator of Estate of Sam'l Thompson, late of Amesbury, Mass., the sum of forty-one hundred, eighty-five 10/100 dollars to accumulate for Hazen V. Thompson, of Haverhill, Mass., of current funds, upon which the said Company will allow interest at the annual rate of two and one-half per cent. from this

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date, none if drawn in thirty days, and on demand will repay the like amount of United States notes or other current funds, with the interest, to the said Judge of Probate Court, Essex County, Mass., or his assigns, on the return of this certificate, which is assignable only on the books of the Company. The right is reserved by the Company, upon giving ten days' notice, to reduce the rate, or discontinue the payment of interest on this certificate, or pay off the principal. Such notice to be served personally or through the Post Office, directed to the address named on the books of this Company.

"N. H. Henchman, Secretary. Howard B. Allen, Receiving Teller."

Various payments were made by the defendant from the deposit from time to time under decrees of the Superior Court in suits then pending.

On May 31, 1895, the defendant sent the following letter to Hazen V. Thompson, which was received by him: "May 31, 1895. 5 P.M. Mr. Hazen V. Thompson, Haverhill, Mass. Dear Sir: In the matter of the Deposit with this Company which by the decision ordered and decreed by the Probate Court of Essex County, Mass., under date of May 13, 1895, after payment of your assignments and orders, there remains for your benefit the sum of twenty-eight hundred, forty and 46/100 dollars ($2840.46) as cash May 21, 1895. Our certificate so showing No. 3009 is in possession of the Probate Court of said Essex County, Salem, Mr. J. T. Mahoney, Register. We now desire to notify you that no interest will be paid upon said amount after the first day of June, 1895, or allowed thereon. Yours very respectfully, N. H. Henchman, Secretary."

No other notice was ever sent to Hazen V. Thompson, and no notice was sent to the judge of the Probate Court for the County of Essex that no further interest would be allowed on said certificate.

On its date the defendant sent to the register of probate of Essex County the following letter: "June 14, 1895. J. T. Mahoney, Esq., Register of Probate, Essex County, Salem, Mass. Dear Sir: As yet we fail to have acknowledgment from Mr. Hazen V. Thompson, of our letter to him in relation to certifi-

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cate No. 3009 and balance as Decreed belonging to him. Altho', we tried by registered mail and otherwise to reach him, as we distinctly wish him to understand that the interest ceased on June first 1895. Yours very truly, N. H. Henchman, Secretary."

On October 24, 1907, the judge of probate of Essex County, (who is one of the plaintiffs,) made a decree that "the balance of deposit due on said certificate, with any accumulations which may have accrued thereon since the time when said deposit was made," be paid by the defendant to the plaintiff as administrator of the estate of Hazen V. Thompson.

If no interest was to be allowed on the deposit after June 1, 1895, the plaintiff administrator was entitled to $1,304.75. If interest at the annual rate of two and one half per cent was to be allowed, the plaintiff administrator was entitled to $2,049.67. If interest at the annual rate of six per cent was to be allowed, $3,092.57 should be paid to the plaintiff administrator.

At the request of the parties, the judge reported the case for determination by this court.

H. J. Cole, administrator, *pro se*.

B. E. Eames, for the defendant.

SHELDON, J. The certificate issued by the defendant acknowledged that it had received the money from the judge of probate, and contained a promise to repay it to him or his assigns. It must be treated as showing that the agreement was made with him. The agreed facts sufficiently show that the deposit was intended to be made under the provisions of Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23. These provisions contemplated that the amount so deposited should "accumulate for the benefit of the person entitled thereto," and accordingly the defendant agreed to pay interest thereon at the annual rate of two and a half per cent, reserving however the right, upon giving ten days' notice, to reduce the rate or discontinue the payment of interest. The defendant now contends that by reason of its notice of May 31, 1895, to Mr. Thompson, the *cestui que trust* for whose benefit the deposit was held, especially in view of its letter of June 14, 1895, to the register of probate, its liability to pay interest was determined; and this is the question contained in the case.

The debt from the defendant was due to the judge of probate,

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and Thompson had only an equitable interest therein. *Chase* v. *Thompson*, 158 Mass. 14. The defendant's notice to stop the accruing of interest should therefore have been given to the judge of probate, who, in the ordinary case of an unclaimed deposit made under the statute in question, would be the only person who could withdraw the deposit and place it where it might continue to accumulate as contemplated by the statute. The defendant's right to give the notice either by personal service or "through the post office, directed to the address named" on its own books, is not of consequence; for it does not appear that the defendant had put any such address on its books, and its counsel at the argument in this court disavowed any desire to have the agreed facts discharged or amended in this respect.

We think it plain that neither a notice of one day given to Thompson, nor a letter to the register of probate stating the claim that the stipulated interest had ceased in consequence of that notice to Thompson, can be said to be a ten days' notice to the judge of probate, especially when it does not appear that either the notice or the letter was brought to the knowledge of the judge.

The defendant could terminate its agreement to pay interest at the stipulated rate only by meeting the burden of showing that it had given the notice specified in its agreement to the person and in the manner therein provided. This it has not done; and accordingly its liability has continued under its original agreement. It cannot of course be held liable for a higher rate of interest than was stipulated for, but it must be held to perform the agreement which it made.

We have carefully considered the suggestions made in the able argument for the defendant; but we have not been able to assent to them. As to the defendant, the title to the deposit was in the judge of probate. The deposit was made in his name, as the statute contemplated that it should be; the defendant's promise was to pay to him or his assigns; under the agreement no one could require payment without his order and authority, whether the deposit was or was not made under the statute. He was in no sense the principal or the agent of Thompson, or of any one else who might have been found to be entitled to the money. And the plaintiff does not strictly claim under Thomp-

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son, but under the decree made by the judge of probate on October 24, 1907. Without this decree the plaintiff would have had no standing in court.

There can be no presumption that a letter to the register of probate is given to the judge, nor is the former in any sense the agent of the latter. He is a public officer whose duties are prescribed by law, and the defendant's letter was addressed to him in his official capacity only.

There was no duty upon Thompson either to take any action or to give any counter notice to the defendant when he received its unauthorized notice. His inaction could create no estoppel that would be operative against any future order of the judge of probate; and manifestly the plaintiff cannot be in a worse position than Thompson would have been.

Accordingly, under the agreement of the parties, a decree is to be entered that the plaintiff recover of the defendant the sum of $2,049.67, without costs.

So ordered.

ADELINE L. HASKELL, administratrix, *vs.* ALBERT C. MANSON & others, executors.

Suffolk. December 4, 1908. — January 7, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Executor and Administrator. Limitations, Statute of. Fraud.

Whether a payment, made by one of two executors against the objection of his co-executor upon a promissory note which in the lifetime of the testator had become barred by the general statute of limitations, R. L. c. 202, §§ 1, 2, would remove the bar of the statute, here was left an open question.

The plaintiff in a suit in equity was the administratrix of the estate of the payee of a non-negotiable promissory note, and she and her daughter and one who had no other interest in the estate of the maker except as executor were the executors of the will of the maker of the note, and all of them were defendants. The suit was to enforce payment of the note. The plaintiff alone would benefit by such payment. It appeared that, before the death of the maker of the note, action upon it had become barred by the general statute of limitations, R. L. c. 202, § 2. The third executor for that reason refused to allow payment of the note and thereupon the plaintiff and her daughter, the other two executors, paid $1 to the plaintiff as administratrix of the payee and joined in a written acknowl-

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edgment of the existence of the debt evidenced by the note. *Held*, that, the third executor objecting, the payment by the other two made for the purpose of benefiting one of them, the plaintiff, personally could not operate to bind the estate represented by the defendants to its detriment by removing the bar of the statute of limitations.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk on March 23, 1908, by Adeline L. Haskell, administratrix of the estate of Waldo C. Haskell, late of Boston, against the executors of the will of Jacob M. Haskell, of whom she was one, seeking to enforce payment of certain non-negotiable promissory notes made by the defendants' testator and payable to the plaintiff's intestate.

The case was heard by *Fox*, J., a commissioner having been appointed to take the evidence. The material facts are stated in the opinion.

The judge made the following memorandum of his decision:

"It is admitted that the paper (Exhibit 9) signed by two executors, one of whom is also the plaintiff in this suit and the only person interested in the prosecution of it, was prepared by the plaintiff's counsel in order to anticipate and avoid the defense of the statute of limitations, which it was expected the third executor would insist upon. If (as is conceded) one of several executors may insist upon the statutory bar even if the other executors are willing to waive it, I think it must follow that it is not open to the other executors to strike down his defense by the device which was resorted to in this case. See also Pub. Sts. c. 197, § 17, the language of which has been changed by the last revision. (R. L. c. 202, § 14.) I think, too, that the testimony tending to show that the son, ten years after the rights of action had accrued, asked the father to pay certain of his bills 'on account,' and that the father paid them, there being nothing in the testimony to indicate on what account the bills were paid, is not enough to avoid the bar. (*Pond* v. *Williams*, 1 Gray, 630; *Ramsey* v. *Warner*, 97 Mass. 8, 13.) Bill to be dismissed."

The bill accordingly was dismissed; and the plaintiff appealed.

G. C. Abbott, for the plaintiff.

J. W. Farley, (*A. G. Mitton* with him,) for the defendants.

KNOWLTON, C. J. This is a bill in equity to recover the

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amount of five non-negotiable promissory notes, called in the bill evidences of indebtedness, which were signed by Jacob M. Haskell and made payable to his son Waldo C. Haskell, with interest at seven per cent. The son died on February 1, 1906, and the father died on the fourth day of November in the same year. The father left a will in which his partner, Albert C. Manson, his wife Adeline L. Haskell, and his daughter Adeline M. Haskell, were named as executors. The first of these notes, which was more than thirteen times as much in amount as all the others together, was barred by the statute of limitations nearly seven years before the son's death, and the last was so barred nearly four years before his death. The will of Jacob M. Haskell was made after the death of his son Waldo, and by its terms his widow was to have the income of all his property for her life, and after her death the principal is to be divided equally between his son Edward M. and his daughter Adeline M. After the probate of the will and the appointment of the three executors named in it, the widow was appointed administrator of the estate of her son Waldo, and sought to collect these notes. They amounted to $15,575 as principal, with interest on nearly the whole amount for about fifteen years, at the time of the commencement of this suit. Her son Waldo left no debts, and one half of this amount, if collected, would go to her absolutely as one of his heirs at law, and the other half would go back to her husband's estate. Her co-executor Manson was unwilling to pay these notes, because, among other reasons, he was advised that the statute of limitations had run against them and that he could not legally pay them. Thereupon she and her daughter joined in a written statement and admission that they, as executors of her husband's will, had made a payment of $1, upon each of the notes, to Mr. Abbott, as attorney for Adeline L. Haskell, "as she is the administratrix of the estate of Waldo C. Haskell." The paper closed with a copy of the notes, and contained this recital: "The object of these payments is to avoid the general statute of limitations, which, in the absence of some evidence of payment, might be pleaded to some or all of said evidences of indebtedness. As such executors we do hereby admit the existence of the debts indicated by said evidences of indebtedness."

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The principal question before us is whether this payment removed the bar of the statute of limitations, so that the other executor cannot rely upon it under his answer. The two executors who made the payments were defaulted, and as against them the bill was taken for confessed.

It is the rule in this Commonwealth, in England, and in most of the American States, that an executor or administrator is not bound to plead the general statute of limitations. *Scott* v. *Hancock*, 13 Mass. 162. *Baxter* v. *Penniman*, 8 Mass. 133. *Emerson* v. *Thompson*, 16 Mass. 428. *Slattery* v. *Doyle*, 180 Mass. 27. *Field* v. *White*, 29 Ch. D. 358. *Midgley* v. *Midgley*, [1893] 3 Ch. 282. *Shreve* v. *Joyce*, 7 Vroom, 44. *Johnson* v. *Beardslee*, 15 Johns. 3. *Hord* v. *Lee*, 4 T. B. Mon. 36. So, too, it is a general doctrine that payment by one of two or more joint executors will have the same effect as payment by all. Such is the usual effect of an authorized official act of an executor, so far as it relates to the property of the estate. But the rule that an executor or administrator is not bound to plead the statute of limitations is an exception to the general rule that it is his duty to protect the property and interests of the estate under his charge. It is universally agreed that it ought not to be extended. An executor or administrator is liable for a devastavit, if the estate suffers through his failure to plead the statute of frauds. *Field* v. *White*, 29 Ch. D. 358. An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt.

The above mentioned exception relative to the statute of limitations is founded upon the theory that an acknowledgment and new promise does not create a new liability, but continues an old one that otherwise might not be enforceable. There is some ground for holding that, where a debt has been barred by the statute before the death of the debtor, an administrator or executor should not be permitted to revive it, by a partial payment, or a new promise or acknowledgment of any kind. Although the distinction has not been established in this Commonwealth between the effect of a payment and acknowledgment by an executor or administrator of a debt which was not barred at the time of his appointment, and the payment of a debt that was barred in the lifetime of the debtor; and al-

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though theoretically the nature of such a new undertaking by the original debtor may have been treated as the same in reference to a debt already barred as in reference to a debt against which the time of limitation has not expired, it is a significant fact that, in every case that we have found in Massachusetts in which a payment or acknowledgment by an executor or administrator was held to have extended the time, the debt was not barred in the lifetime of the debtor. The executor or administrator was simply continuing in force a debt which was collectible from him after his appointment. In *Pole* v. *Simmons*, 49 Md. 14, 21, 22, a promise by an executor, after the statute had fully run in the lifetime of the debtor, was treated as a new promise, made without authority, and insufficient to create a liability. See also *Peck* v. *Botsford*, 7 Conn. 172; *Cayuga County Bank* v. *Bennett*, 5 Hill, 236. In many of the States of this country, either under statutes or the decisions of the courts, a debt which was barred in the lifetime of the debtor cannot be revived by his representative after his death. *McLaren* v. *McMartin*, 36 N. Y. 88. *Fritz* v. *Thomas*, 1 Whart. 66. *Langworthy* v. *Baker*, 23 Ill. 484. *Patterson* v. *Cobb*, 4 Fla. 481. *Etchas* v. *Orena*, 127 Cal. 588, 592. *Van Winkle* v. *Blackford*, 33 W. Va. 573. *Smith* v. *Pattie*, 81 Va. 654. *Bambrick* v. *Bambrick*, 157 Mo. 423. *O'Keefe* v. *Foster*, 5 Wyo. 343. *Jones* v. *Powning*, 25 Nev. 399. *In re Mouillerat's estate*, 14 Mont. 245. *Rector* v. *Conway*, 20 Ark. 79. *Moore* v. *Hardison*, 10 Texas, 467.

It has never been decided in Massachusetts that a payment made by one of two executors against the objection of his coexecutor, upon a note which was barred by the statute in the lifetime of the testator, would revive the note, nor has it been so decided in England. The lords justices of the court of appeal, in a late case, preferred to leave this subject open for future consideration. *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

But if we assume, without deciding, that these doubtful questions might be answered in favor of the plaintiff, she has another difficulty in her way. The payment was the joint act of the mother and daughter, and was made to the mother as the administratrix of her son's estate, entirely for her personal benefit as one of his two heirs at law. In her trust relation to the estate

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of her husband, she could not make a payment to herself in a different relation, especially when she would be the only beneficiary, and thereby bind her husband's estate, so as to put it in a pecuniary condition less favorable than it would have been in under a decision by the court. Such an act is voidable by any one interested in her husband's estate. This is no less so because her daughter was induced to join her in making the payment. There was no separate and independent action by the daughter. The payment was a single act, and the declaration in writing was a single statement and acknowledgment in which they both joined. Because the mother was the other party to the transaction, with an adverse interest, it is voidable. The principle was applied in *Richmond, petitioner*, 2 Pick. 567, of which the headnote is in part: "An administrator cannot revive a debt due to himself from the intestate, which at the time of the intestate's decease was barred by the statute of limitations." Chief Justice Parker said: "The petitioner cannot avoid the presumption of payment, except by showing a renewal of the promise, and he cannot show that, being himself the administrator." The same doctrine was again applied in *Grinnell* v. *Baxter*, 17 Pick. 383.

If these two executors had jointly paid to the mother the whole amount of the notes, and had sought to have the payment allowed in their account in the Probate Court, the other executor might have objected, and set up the contention that the notes were barred, and not a proper charge against the estate. As the payment by an executor or administrator of a debt to himself is always reviewable by the court, and as the court will, when different joint executors make different pleas to a claim against an estate, proceed upon the plea which is most favorable to the estate (2 Wms. Ex., 8th ed., 1953; *Midgley* v. *Midgley*, [1893] 3 Ch. 282), the court would feel obliged to sustain the objection. A court of equity will not give to the joint payment and acknowledgment of these executors an effect that the Probate Court would not give to it, if the question arose there upon an objection of the defendant Manson that the claim could not be allowed against the estate.

The presiding judge rightly found that there were no payments upon these notes in the lifetime of the testator. His son

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Waldo was forty-eight years of age at the time of his death. He had been an invalid all his life, and had lived all the time in his father's family. Only two years of the time did he do anything to earn an income. He had been a member of an expensive social club, and at different times had been obliged to have surgical treatment in hospitals. His father had paid all his bills, and had furnished him money whenever he wanted it, without ever making any charge against him or keeping any account of it. In the same way he had provided support and paid money for his daughter Adeline. The relations of the parties and their dealings together tend to show that no payment was ever made upon either of these notes. So far as it appears, they were never referred to between the parties.

Decree affirmed.

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ACTIONABLE TORT.

An action of tort cannot be maintained by one mentioned as a legatee in a will against persons who by conspiring together procured and retained possession of the will and prevented its being offered for probate, since the Probate Court has power to give the aggrieved party ample redress, and therefore has exclusive jurisdiction of the matter. *Thayer* v. *Kitchen*, 382.

Action of tort by riparian owner on former course of Stony Brook cannot be maintained against city of Boston to recover damages resulting from diversion of water of brook, although his name was not mentioned in instrument of taking, nor was any mention made therein of his land or of his rights, see DAMAGES, 3, 4.

Application of rule that action of tort for personal injuries alleged to have resulted from negligence of defendant cannot be maintained without proof of damage which was suffered by plaintiff and which he could not have avoided by conducting himself as reasonable man should have done under circumstances, see NEGLIGENCE, 52–55.

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See EXECUTOR AND ADMINISTRATOR.

AGENCY.

Existence of Relation.

1. The register of probate of a county is not an agent of the judge of probate of that county with authority to receive on behalf of the judge notices with regard to a deposit made in a bank by the administrator of an estate in the judge's name under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23, of a fund which has been ordered by the court to be paid to a certain person who has refused to receive it. *Cole* v. *New England Trust Co.* 594.
2. The mere fact that one writes a letter upon the letter paper and under the letterhead of a corporation is no evidence that while so doing he is acting as an agent of the corporation. *Deane* v. *American Glue Co.* 459.
3. Where one, who is engaged in business as an "electrical contractor" and who never has dealt in glue, at the suggestion of a glue broker and jobber enters into an arrangement whereby the broker is permitted to use the

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name and credit of the "electrical contractor" in the purchase and resale of glue to be invoiced and billed in the name of the "electrical contractor," who is to receive therefor a commission of two and one half per cent, and the broker, with the knowledge and consent of the "electrical contractor," fixes the price at which the glue shall be sold, makes sales and collects the proceeds from the purchasers, the broker must be deemed to be the agent of the "electrical contractor" in the transactions as to glue. *Deane* v. *American Glue Co.* 459.

4. At the trial of an action of tort against one owning and operating a brewery, to recover for personal injuries alleged to have been received by the plaintiff owing to the negligent starting of machinery while the plaintiff was working upon it, it appeared that the machinery was started by an employee of the defendant, who, if the plaintiff also was such an employee, was a fellow servant of the plaintiff. All the evidence tended to show that the plaintiff was employed by one J., and was sent by him to perform certain repairs upon the defendant's machinery, that while making such repairs he took all his directions from the defendant, who could change or stop his work at any moment, that he was paid by J., who rendered a bill to the defendant and included therein a charge for the plaintiff's labor. *Held*, that, when injured, the plaintiff was furnished by J. to work as a servant of the defendant, and was such servant, and therefore could not recover since his injury was due to the negligence of a fellow servant. *Munsie* v. *Springfield Breweries Co.* 79.

5. At the trial of an action of tort for personal injuries, it appeared that the plaintiff was injured by reason of the negligence of one who, if the plaintiff at the time of the accident was in the employ of the defendant, would have been the plaintiff's fellow servant, and therefore a material question was whether or not at the time of the accident the plaintiff was employed by the defendant. There was evidence that the plaintiff was hired by one J., who from time to time sent him to do repair work for various of his customers. The plaintiff offered to show that, the day before the accident, J., after a telephone message from the defendant, ordered the plaintiff to go to the defendant's brewery and make certain repairs. The evidence was excluded, and the plaintiff excepted. *Held*, that the exception must be overruled, since the evidence offered did not tend to show that the plaintiff when injured was not employed in the defendant's business and subject to his control. *Ibid.*

Employee of valve company loaned to engine company to assist latter to install machinery with former held under circumstances to be employee of engine company, see NEGLIGENCE, 5.

Scope of Employment.

6. The mere fact that a person wrote a letter upon the letter paper and under the printed letterhead of a corporation does not make statements contained in the letter admissible as admissions binding upon the corporation in the absence of further evidence showing that the person who wrote the letter was an agent of the corporation with authority to make such admissions. *Deane* v. *American Glue Co.* 459.

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7. At the trial of an action of tort against an insurance company to recover for slanders alleged to have been published concerning the plaintiff, an agent for another insurance company, by employees of the defendant whose duty it was to solicit business, the plaintiff offered to prove that slanderous words were published as alleged on October 2 and 10, that the plaintiff consulted an attorney at law who on October 29 and November 5 wrote to the "superintendent of agencies" of the defendant, complaining on the plaintiff's behalf; that the superintendent replied asking for further details and stating that such methods were contrary to express orders of the defendant and that the defendant tried to avoid "such things" as much as possible; that, at the suggestion of the superintendent, on November 9 one who had charge for the defendant of the agents of the district in which the plaintiff did business interviewed the plaintiff's attorney and said he would report to the superintendent; that early in December the plaintiff's attorney had a conversation with the defendant's superintendent of agencies in which the latter told the attorney that he could do nothing for the plaintiff in the matter, that he "had a thousand cases like this one of [the plaintiff] in his office if he wanted to push them"; that further slanders of the same nature afterwards were published by the defendant's employees on December 19 and January 1, 3, 8 and 10; and that because of the slanderous statements the plaintiff had lost business which the defendant had got the benefit of. The presiding judge, on the plaintiff's offer of proof, directed a verdict for the defendant. *Held*, that the verdict was directed rightly, since the jury would not have been warranted, from the evidence offered, in finding that the persons who published the slanders had any actual authority from the defendant to do so or acted with its knowledge, or that their acts were ratified by the defendant, nor did the offer include any evidence tending to show that the agents of the defendant, in publishing the slanders, acted within the scope of their employment as soliciting agents. *Kane* v. *Boston Mutual Life Ins. Co.* 265.

Because person, whose negligence, the plaintiff contended, caused his injury, was not superintendent or one acting as superintendent in absence of superintendent of defendant, action by employee against employer for recovery under R. L. c. 106, § 71, cl. 2, was held not to be maintainable, see NEGLIGENCE, 8–10.

It is not within scope of employment of foreman of teaming business to demonstrate to fellow employee working of magazine gun which foreman had lent to employer to shoot cat and which employer had returned to him, see NEGLIGENCE, 4.

Finding for defendant in action for conversion of glue which plaintiff contended defendant through his agent, glue broker, had procured from plaintiff by fraud, held to have been warranted because on evidence judge might have found that broker was agent of plaintiff and, while acting within scope of his authority, conveyed glue to defendant, see CONVERSION, 2.

Ratification.

Action against insurance company for slanders alleged to have been published concerning plaintiff by agents of defendant held not to be main-

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Agency (*continued*).

tainable because of lack of evidence of authority of agents or of ratification by defendant of agent's acts, see *ante*, 7.

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8. Where, acting on behalf of another, a glue broker and jobber sold glue to one, who did not know and had no reason to know that the broker and jobber was acting otherwise than on his own behalf and to whom the broker and jobber was indebted in a sum larger than the purchase price of the glue, the broker's principal cannot recover the price of the glue from the purchaser, since he is subject to the equities in the purchaser's favor which existed between the purchaser and the broker and jobber, and the purchaser has a right to set off the broker's debt to him. *Deane* v. *American Glue Co.* 459.

ALTERATION OF INSTRUMENTS.

Remedy of mortgagor or his heirs in case of sale of land in foreclosure of mortgage which mortgagee altered after it had been executed and delivered by mortgagor, see REAL ACTION.

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In suits in equity, see EQUITY PLEADING AND PRACTICE, 7–9.

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See TAX, 1–4.

ASSIGNMENT.

By the provisions of a will an undivided one third interest in certain real estate was devised to a trustee "the net income . . . to pay to . . . E. during his life." E. made an agreement in writing for a good consideration that his life interest "shall remain so held in trust, but if at any time any of said properties shall be sold, the value of the life interest of E. in the proceeds shall be computed . . . and shall be" applied by E. or the trustee in payment of certain debts due other parties to the agreement, "or if the said trustee shall prefer he may invest E.'s share of such proceeds and pay or apply the income thereof during the life of E. upon such" debts. A creditor of E. who was not a party to the agreement sought by a bill in equity to reach and apply the interest of E. under the will, and contended that he was not affected by the agreement because it was not recorded under R. L. c. 127, § 4, as a conveyance of real estate, and because he had no notice of it as a trust, as required by R. L. c. 147, § 3. A single justice ruled that the creditor could reach and apply in satisfaction of his debt only E.'s interest in the trust subject to the agreement, and the creditor appealed. *Held*, that the ruling of the single justice was correct, since no recording or notice of the agreement was necessary because it did not pur-

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port to convey any interest in the realty, but only in E.'s share of the proceeds in case of a sale during his lifetime. *Cashman* v. *Bangs*, 498.

Rights of one party to contract in writing to damages for non-performance by other party held to be assignable, see CONTRACT, 16.

Constitutionality of St. 1908, c. 605, § 7, regarding assignments of or orders for wages to be earned in future, see CONSTITUTIONAL LAW, 1, 3, 4, 7.

Indorsement and delivery of non-negotiable promissory note operate as assignment and give assignee right to sue thereon in his own name, see BILLS AND NOTES, 2

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Action by traveller on highway to recover for injuries received from being run into by automobile driven by defendant, see EVIDENCE, 4, 5.

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Whether in action of contract defendant shall be allowed to amend answer after verdict to set up discharge in bankruptcy granted while case pending, is within discretion of judge, see PRACTICE, CIVIL, 1.

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BILLS AND NOTES.

Validity.

1. It is now settled law in this Commonwealth that the marriage of the maker of a valid promissory note to the payee does not extinguish the note or render it void. *MacKeown* v. *Lacey*, 437.

Assignment.

2. The indorsement and delivery of a non-negotiable promissory note operate as an assignment of the note, and under R. L. c. 173, § 4, the indorsee

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can sue on the note in his own name as assignee. *MacKeown* v. *Lacey*, 437.

Liability of Indorser.

3. Where a promissory note is made payable to the order of the maker and is indorsed by the maker, persons who indorse the note below the indorsement of the maker before the delivery of the note do not become joint makers or co-sureties, but have the rights against each other of successive indorsers. *Bamford* v. *Boynton*, 560.

Effect as Payment.

Certain promissory note given to insurance company held not to be payment of premium due under policy, see INSURANCE, 4.

Evidence warranting finding that promissory note was not accepted as payment of debt, see PAYMENT.

BOARD OF HEALTH.

1. The refusal of the board of health of a city to grant a license as an undertaker to one, who is shown to be qualified in other respects for the occupation, solely for the reason that he is not licensed as an embalmer is illegal, and, where it appears that the license, except for that reason, would have been granted, a peremptory writ of mandamus will be issued ordering the board of health to grant the license. *Wyeth* v. *Cambridge Board of Health*, 474.

2. A report by a single justice to the full court of the questions of law arising upon a petition for a writ of mandamus addressed to the board of health of a city directing them to issue to the petitioner a license as an undertaker, which the respondents had refused to issue for the reason that the petitioner was not licensed as an embalmer, contained the following reservation: "If the refusal of the respondents to grant the petitioner a license as an undertaker solely for the reason that he is not licensed as an embalmer is unwarranted, improper, and illegal, a writ of mandamus is to issue; if it is legal and properly authorized under the law and constitution the petition is to be dismissed." *Held*, that by the terms of the report the question of discretion whether the writ should be granted must be taken to have been decided in favor of the petitioner, that the report was equivalent to a finding upon the answer and the agreed facts that the only reason for the respondents' refusal was that the petitioner was not licensed as an embalmer, and that, except for this, the respondents in the exercise of their judgment and discretion would have granted the license, and that, therefore, upon this court deciding that the reason given by the respondents for refusing the license was without foundation in law or reason, nothing remained to be done but to enter an order that a peremptory writ of mandamus should issue. *Ibid.*

BOSTON ELEVATED RAILWAY COMPANY.

Boston Elevated Railway Company does not operate "railroad" within meaning of R. L. c. 106, § 71, cl. 3, see NEGLIGENCE, 17, 18.

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BOUNDARY.

Where at the trial in the Superior Court, on an appeal from the Land Court, of an issue framed by a judge of the Land Court, as to the location of the boundary line between the adjoining premises of the demandant and the tenant in a writ of entry as marked by a former fence, the tenant introduces in evidence the report in his favor of the judge of the Land Court, which by St. 1905, c. 288, is made *prima facie* evidence, and also introduces other evidence, to show that the fence was where he says it was, and the demandant introduces evidence to show that the fence was where he says it was, the question is purely one of fact and it cannot be ruled as matter of law that the demandant is entitled to a verdict in his favor. *De Ponta* v. *Driscoll*, 225.

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Power of Legislature to control city of Fitchburg in administration of Burbank Hospital by prescribing who shall be officers and agents for that purpose, see CHARITY, 4.

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Petition for writ of mandamus to compel board of health of Cambridge to grant license as undertaker to one to whom they had refused it solely for reason that he was not licensed as embalmer by board of registration in embalming, involving questions of extent of power of such registration board and of Legislature, see BOARD OF HEALTH, 1, 2; CONSTITUTIONAL LAW, 2, 5.

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Actions by passengers for injuries alleged to be due to negligence chargeable to street railway companies, see NEGLIGENCE, 50–58.

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Application, in action against carrier of passengers for injuries alleged to have been received by reason of derailment of car, of rule that such action cannot be maintained without proof of damage which was suffered by plaintiff and which he could not have avoided by conducting himself as reasonable man should have done under circumstances, see NEGLIGENCE, 52–55.

Case where street railway company was held not to be liable for injury to passenger resulting from derailment of car caused by defect in switch, it appearing that company had exercised as much care in inspection of

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switch as was consistent with practical operation of railway, although it also appeared that with greater care defect would have been avoided, see NEGLIGENCE, 50.

CEMETERY.

Money loaned on mortgage upon real estate dedicated to use as cemetery is not exempt from taxation, but is taxable as personal property, see TAX, 2.

CHARITY.

For Specific Purpose.

1. A testatrix by her will, after giving certain legacies, provided as follows: "The remainder shall . . . be given to the town of Marblehead toward the erection of a building that shall be for the sick and poor, those without homes. I leave this in the hands of B., B. and R. of Marblehead." The amount of the residue of the estate was about $8,000. The town of Marblehead at a meeting of the voters declined to accept the legacy. *Held*, that the gift constituted a public charity for a specific purpose, that it was given "toward the erection of a building" by the town, and that the action of the town was equivalent to a refusal to erect such a building, that the purpose stated in the will thus having become impossible of execution, and there being nothing to indicate that the testatrix intended to make provision generally for the sick and poor of the town or for those without homes unless they could be provided with a home in a building to be erected for their use, the gift failed, and the residuary estate went to the next of kin of the testatrix. *Bowden* v. *Brown*, 269.

For General Purpose.

2. A testatrix bequeathed the residue of her estate, at the termination of a life interest, "to be given to the life saving station to be built and established in Marblehead or Nahant, not yet decided upon." The residue amounted to about $6,000. When the will was made the testatrix knew of the intention of the United States government to establish a life saving station in the neighborhood of Nahant. At that time a life saving station had been completed at Nahant, although it did not go into commission until six months later. This station was about four or five miles from the nearest part of the shore of Marblehead. No life saving station has been established at Marblehead and no such establishment is contemplated. The treasurer of the United States filed in the case a disclaimer of any interest in the residue of the estate of the testatrix, by which it appeared that the United States declined the trust. *Held*, that the purpose of the testatrix in devoting her gift to the life saving station was not limited to the maintenance of the station itself, which was the specific object named in the will, but was a charitable wish to be helpful in the general saving of life and relief of suffering in cases of shipwreck in the vicinity of Nahant and Marblehead, and therefore that the gift created a public charity for a general charitable purpose, which, as its administration in the precise way stated in the will had become impossible, would

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be administered *cy pres*, under a scheme, to be devised by or under the direction of the Probate Court. *Richardson* v. *Mullery*, 247.

Gift in trust which constituted public charity but was for specific purpose held not to be administered *cy pres* upon purpose's becoming impossible of execution, see *ante*, 1.

Control of City by Legislature in Administration of Public Charity.

3. In this Commonwealth the Legislature have the power to control cities in their administration of public charities, especially with the formally expressed assent of the city by its acceptance of the statute making the provision, by prescribing who shall be the officers and agents to whom such administration shall be entrusted and the mode of their selection, where these matters are not provided for in the instrument creating the trust. *Ware* v. *Fitchburg*, 61.

4. Gardner S. Burbank by his will gave to the city of Fitchburg a fund for the founding and maintaining of a hospital. St. 1890, c. 422, which recited the fact of this gift and quoted in full the residuary clause of the will, created a corporation by the name of the Burbank Hospital "to enable the inhabitants of said city of Fitchburg to receive the benefits of said generous bequest of said testator and effectually to realize and meet the benevolent intentions expressed in his said will." The statute provided for a board of trustees, who, with the exception of certain members *ex officiis*, should be self perpetuating, and who should report annually to the city council with an account of receipts and expenditures. Further provisions of the statute were as follows: "This act shall take effect whenever it shall be accepted by a concurrent vote of the board of aldermen and common council of the city of Fitchburg. Nothing in this act contained shall be held to alter or impair any trust created by said will. And the corporation hereby created, acting through its trustees and proper officers, shall be deemed the agent of said city of Fitchburg for the proper execution of all trusts arising under the provisions of said will. And nothing in this act contained shall be construed as releasing the city of Fitchburg from any obligation arising from the acceptance of said bequest under said will, or from any condition made therein." The city accepted the statute in the manner provided therein. Later the trustees under the will of the testator brought a bill for instructions as to whom they should pay over the trust fund, making the hospital corporation and the city defendants. The city contended that the statute was unconstitutional as an attempt to exercise the judicial power, contrary to art. 30 of the Declaration of Rights, by removing one trustee and appointing another, and also that the hospital corporation could not be regarded as its agent against its consent and without power on its part to revoke the authority. *Held*, that the title of the city to the charitable fund was not interfered with by the provisions of the statute, that the city, retaining the title to the property and its position as trustee, must act through some instrumentality, and that the Legislature had provided what they deemed to be a proper one for the purpose, which moreover had been accepted by the city, and that the city could not revoke the authority of the hospital corporation to act as its

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agent, as might be done between natural persons who are *sui juris;* therefore, that the plaintiffs should pay over the trust fund in their hands to the Burbank Hospital as the agent of the city of Fitchburg, upon its giving them proper acquittance and discharge therefor in the name of the city. *Ware* v. *Fitchburg*, 61.

What constitutes Charitable Corporation.

5. A corporation, organized under Pub. Sts. c. 115, without capital stock or stockholders, for the purpose of providing a home for working girls at moderate cost, which conducts such a home for working girls, furnishing board and lodging at cost and free medical attendance as well as the use of a library and, in the winter months, weekly entertainments and lectures without charge, whose officers serve without pecuniary compensation and whose necessary disbursements required to maintain the institution cannot be met in full except by donations from those interested in its welfare, and are so met, is as matter of law a charitable corporation. *Thornton* v. *Franklin Square House*, 465.

Non-liability of Charitable Corporation for Torts of Agents.

6. A charitable corporation is not liable for injuries caused by the negligence of its servants or agents properly selected. *Thornton* v. *Franklin Square House*, 465.

CHILD.

Negligence of child held not imputable to parent, see NEGLIGENCE, 2.

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employees who are members of union to leave his employ by threatening to impose fines under by-law of union, see UNLAWFUL INTERFERENCE.

CONSTITUTIONAL LAW.

Unconstitutionality of Part of Statute.

1. The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are so far separable from the provisions contained in the sections of the same statute preceding § 6, that it may be assumed that the Legislature would have enacted them even if they had thought that the sections preceding § 6 would be held to be of no effect, and are constitutional whether such preceding sections are constitutional or not, no opinion in regard to the constitutionality of such preceding sections being intimated. *Mutual Loan Co.* v. *Martell*, 482.

Delegation of Legislative Power.

2. *It seems*, that, if St. 1905, c. 473, § 6, undertook to empower the board of registration in embalming to pass a rule that no boards of health or other persons authorized to issue burial permits should issue them to any person who has not registered and received a certificate from the board of registration in embalming, it would be held to be unconstitutional as assuming to delegate general legislative authority. *Wyeth* v. *Cambridge Board of Health*, 474.

Equal Protection of the Laws.

3. The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are not made unconstitutional by the provision of § 6 of the same chapter excepting from the operation of the statute "national banks, all banking institutions under the supervision of the bank commissioner, and loan companies and loan associations established by special charter and placed under said supervision." *Mutual Loan Co.* v. *Martell*, 482.
4. The provisions of St. 1908, c. 605, §§ 7, 8, that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are not unconstitutional in making a distinction between assignments to secure loans of money and assignments as security for necessaries or other property furnished or to be furnished. *Ibid.*

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Right to Pursuit of Happiness.

5. A rule made by the board of registration in embalming, assuming to act under authority of St. 1905, c. 473, § 6, that "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks or selectmen of a town, or any other persons authorized to issue burial permits, to any person or persons who have not been registered and received a certificate from the State board of registration in embalming," is without foundation in law or reason, is a violation of the right of every one under the Constitution of the Commonwealth to pursue any proper vocation to obtain a livelihood, and also is an unreasonable attempt to interfere with the private right to bury the body of a relative or friend, that is not allowable under the Constitution of the Commonwealth or the Constitution of the United States. *Wyeth* v. *Cambridge Board of Health*, 474.

Police Power.

6. The power of the Legislature to exercise complete control of burials of the dead so far as is necessary for the protection of the public health and the promotion of the public safety is unquestioned, but, whether a statute directly forbidding the issuing of a burial license except to a person who has received a certificate as a registered embalmer could be upheld as such an exercise of the police power, may be doubted. *Wyeth* v. *Cambridge Board of Health*, 474.
7. St. 1908, c. 605, § 7, providing that no assignment of or order for wages to be earned in the future, to secure a loan of less than $200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer, and § 8 of the same chapter, providing that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, are constitutional as a proper exercise of the police power in legislating for the public welfare. *Mutual Loan Co.* v. *Martell*, 482.

Control of Government of Cities.

8. Article 2 of the Articles of Amendment to the Constitution of the Commonwealth recognizes the right and duty of the General Court to determine what powers, privileges and immunities should be granted to any city for its regulation and government, and secures to the inhabitants the right to give or withhold their consent to the establishment of a new municipal government, making it plain that different cities may be established with different kinds of government, different officers and different modes of electing them. *Graham* v. *Roberts*, 152.
9. The provisions of the Constitution which forbid the adoption of the so called initiative and referendum in general legislation do not extend to the making of by-laws and ordinances by towns and cities under the authority of the Legislature in regard to matters of local concern. *Ibid.*

Application of above principles to case testing constitutionality of St. 1908, c. 574, amending charter of Haverhill, see HAVERHILL, 1–5.

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Public Charity.

Where instrument creating trust for public charity does not provide who shall be officers and agents to whom administration of trust shall be intrusted, Legislature has power to control cities in such administration by making provisions regarding such officers and agents, see CHARITY, 3.

Application of this principle to case of Burbank Hospital in Fitchburg, see CHARITY, 4.

CONSTRUCTION.

Of deeds, see DEED.

Of wills, see DEVISE AND LEGACY.

Of contracts, see CONTRACT, 8–10, 19, 20; MECHANIC'S LIEN, 2.

Of trusts, see TRUST.

CONTRACT.

What constitutes.

Facts held not to show making of oral contract for insurance against fire, see INSURANCE, 1.

Creation of valid agreement by adoption on week day of contract, which parties had attempted to make by conversation on Lord's day, see LANDLORD AND TENANT, 1.

Variation of Contract in Writing.

1. In equity as well as at law an oral agreement, purporting to control the meaning and legal effect of a contract in writing which is to be made later between the same parties, cannot be enforced to contradict or vary the contract in writing when it is made, the effect of the writing being to merge and control all previous oral agreements inconsistent with it. *Commonwealth Trust Co.* v. *Coveney*, 379.

2. An oral agreement by a trust company to discount notes for a certain person and to renew them from time to time, and to require payment only of such sums as the debtor may realize as profits from the sales of his real estate, cannot be enforced as a defense to an action by the trust company on the notes, either under an answer at law or as an equitable defense under R. L. c. 173, § 28; nor can the debtor maintain an action of contract against the trust company for a breach of its oral agreement in bringing an action to collect the notes in accordance with their terms. *Ibid.*

Construction.

Entire or separable.

3. While it is true that the question, whether a contract is entire or separable, is one of intention, the general rule is that, where the part of the contract to be performed by one party consists of the delivery of several distinct and separate articles, the price to be paid for which is apportioned to each item according to the value thereof and not as one unit in a whole, or as a part of a round sum, the contract will be regarded as separable. *Barlow Manuf. Co.* v. *Stone*, 158.

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Application of above principle in case where contract was held to be separable, and defendant was held not to be entitled to recoup, in action for purchase price of one part of order, for damage due to delay in delivery of another part, see *post*, 19.

Joint or several.

4. A contract in writing was made between an individual as the party of the first part, a corporation as the party of the second part, and seven "other persons . . . designated as the guarantors, parties of the third part." The contract provided, among other things, for the payment of $25,000 by the corporation to the party of the first part. The undertaking of the guarantors was stated as follows: "The guarantors jointly guaranty the payment of said $25,000, or any part thereof, *pro rata*, and also that the corporation will fully and completely perform and fulfil the terms of the agreement with the party of the first part." The corporation having failed to pay the $25,000, an action of contract was brought against one of the guarantors to recover one seventh of the $25,000, and he demurred to the declaration on the ground that the undertaking of the guarantors was a joint guaranty, and that the other guarantors should be joined as defendants. *Held*, that the demurrer should be sustained, since the undertaking of the guarantors was a joint guaranty, it not having been intended by the use of the words "*pro rata*" to change the whole character of the undertaking from what expressly was stated in the contract to be a joint guaranty to a several guaranty by each guarantor of only one seventh of the whole $25,000. *Wood* v. *Farmer*, 209.

Place of delivery.

5. A contract with an architect to import for him from Europe certain steel beams and deliver them to a structural company, having its works at Everett, with which the architect has a contract to work the beams into a desired shape, containing the words "Terms: Cash by sight draft against invoice and delivery to [the structural company] at Boston," is complied with by a delivery of the beams on the wharf in Boston and notifying the corporation of their arrival, and on such delivery and notification the title passes to the buyer, leaving the importer under no obligation to transport the beams from the wharf in Boston to the works of the structural company in Everett, unless he is paid an additional sum for doing so. *Houdlette* v. *Dewey*, 419.

Period of employment.

6. If, according to the provisions of a contract in writing for employment, payments are to be made weekly to the person employed, this circumstance, while it is of but little if any weight where other language in the contract expressly or impliedly describes the term of service to be longer than a week, nevertheless, in the absence of such other evidence, is of great weight in showing that the employment is by the week. *Tubbs* v. *Cummings Co.* 555.

7. A manufacturer of boots and shoes at Worcester advertised for a salesman for certain western territory, and a salesman, who was a stranger to

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him and to whom the manufacturer was a stranger, answered the advertisement and furnished references. The salesman and the manufacturer thereupon on January 5 signed the following "memorandum of agreement": "T. [the salesman] to sell goods for C. [the manufacturer] exclusively and under his direction in the States of Indiana — Illinois — Michigan and Wisconsin and such other territory as may be mutually agreed upon. C. agrees to advance to T. $75 to cover his first weeks salary and legitimate travelling expenses . . . and thereafter $50 each week for such time as T. shall be travelling in [C.'s] exclusive interest and under his direction. If T. shall complete a full year's service in the exclusive interest of C., and his accepted orders shall have been filled and payment received by C. in excess of $48,000," T. was to receive "an additional sum equal to five per cent," of such excess. *Held*, that the contract was a hiring by the week at most and not by the year or for a year. *Tubbs* v. *Cummings Co.* 555.

8. At the trial before a judge without a jury of an action of contract for salary alleged to be due to the plaintiff from the defendant, a corporation, a question at issue was, whether the plaintiff was employed for a year or for a shorter period. There was evidence tending to show that the plaintiff was a director of the defendant and had been employed also to perform other services than those of a director for several years, receiving his pay weekly, that the financial year of the defendant began December 1, that on December 9, 1904, the defendant's board of directors voted that the "salaries" of the president, treasurer, clerk, one B. and the plaintiff "be increased twenty per cent on the amount of their salaries for the year 1904," and the plaintiff was given such increase in one payment, that similar increases and readjustments of salary were made before the middle of December in each of the next two years, that early in December, 1906, one authorized by the defendant stated to the plaintiff, "Your salary for the coming year will be" a certain sum, that about the middle of September, 1907, the president of the defendant, who had authority to employ and discharge employees, notified the plaintiff that, unless he changed certain conditions, his "contract would terminate" January 1, and that the plaintiff replied "If you wish . . . I will accept and make my plans accordingly January first." *Held*, that there was evidence from which a finding was warranted that the employment of the plaintiff was for a yearly period ending November 30, which was by subsequent agreement extended to January 1. *Maynard* v. *Royal Worcester Corset Co.* 1.

Between attorney at law and client.

Construction of contract between attorney at law and his client with regard to when services of attorney are completed and balance of deposit placed in his hands for use of client should be returned to client, see *post*, 20.

Building contracts.

Construction of contract for construction of "coal hoisting tower, cable railroad, etc. . . . to the acceptance of" the owner, "to work perfectly," see *post*, 9, 10.

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On construction of provision of building contract with regard to certificates of architect, payments by owner and absence of mechanic's liens of workmen and subcontractors, demurrer to "answer in abatement" to contractor's petition to enforce mechanic's lien sustained, see MECHANIC'S LIEN, 2.

Building Contracts.

9. By a contract in writing a contractor agreed "to provide all labor and materials required in the construction of one stationary coal hoisting tower, cable railroad, etc., on" a certain wharf for its owner, "in accordance with plans and specifications furnished by" the contractor and made a part of the contract, "and to the acceptance of the" owner of the wharf. *Held*, that the provision that the plant should be constructed "to the acceptance" of the owner of the wharf meant, under the circumstances, only that the materials and the construction should be such that a reasonable man ought to be satisfied with the completed work as conforming to the requirements of the contract and specifications, although it might not perform all the work the owner desired of it. *Cashman* v. *Proctor*, 272.

10. A contractor made with the owner of a wharf a contract in writing to "provide all labor and materials required in the construction of one stationary coal hoisting tower, cable railroad, etc.," on the wharf, in accordance with certain specifications and "to the acceptance of the" owner. In the specifications, which gave a detailed description of the appliances to be furnished, the contractor agreed "to furnish the plant complete, ready to discharge coal and to furnish engineers and other men, at the owner's expense, to operate the same until the same has been thoroughly demonstrated that the plant is working successfully . . . the plant to work perfectly." *Held*, that the contract required that the working of the plant should be successful and perfect when called upon to do the work of which such appliances and machinery as were described in detail in the specifications ought to be capable, and did not require the furnishing of a plant of sufficient capacity to do all the work that the owner might desire. *Ibid.*

On construction of provisions of building contract with regard to certificates of architect, payments by owner and absence of mechanic's liens of workmen and subcontractors, demurrer to "answer in abatement" to contractor's petition to enforce mechanic's lien sustained, see MECHANIC'S LIEN, 2.

Of Bank regarding Deposit by Order of Probate Court.

Bank's contract made on administrator's making deposit under order of Probate Court in accordance with R. L. c. 150, § 23, is with judge of probate, to whom all notices regarding it should be sent, see PROBATE COURT, 4.

Validity.

11. In an action for the price of goods alleged to have been sold and delivered under the terms of an order blank signed by the defendant, in which the defense set up is that the defendant's signature to the instrument sued

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upon was obtained by fraud on the part of the plaintiff's salesman, the defendant may show by oral evidence that a different agreement was made between him and the plaintiff's salesman by word of mouth. *Price* v. *Rosenberg*, 36.

12. If upon the solicitation of a salesman a person signs two order blanks for goods, one retained by the signer and the other taken away by the salesman, he can show, when sued by the principal of the salesman on his alleged contract contained in the blank taken away by the salesman, that the salesman falsely and fraudulently represented to him that the blank taken away by the salesman and afterwards attached to the declaration was the same as the blank retained by the defendant and that the defendant signed the blank attached to the declaration relying on this false and fraudulent representation, and these facts if shown are a good defense to the action. *Ibid.*

13. In an action for the price of goods alleged to have been sold and delivered under the terms of a printed order blank signed by the defendant, in which the defense set up is that the defendant's signature upon the order sued upon was obtained by false and fraudulent representations of the plaintiff's salesman, if it appears that the defendant returned the goods sent to him by the plaintiff stating only that they were not what the plaintiff's salesman had agreed to send, this is not inconsistent with the position that the defendant's signature to the paper annexed to the plaintiff's declaration was procured by fraud and therefore that the paper is not the contract really made between the parties. *Ibid.*

14. A contract in writing by whose terms, upon the organization, later to be accomplished, of a certain corporation by "certain persons" under specified conditions and the acquirement of the title to a certain number of shares of its stock by the party of the first part, the latter agreed to sell and the party of the second part agreed to buy such shares for a certain sum, and various individuals guaranteed that the party of the second part would pay the price agreed upon, is not within the provisions of R. L. c. 74, § 7, providing that a contract for the sale of stock in a corporation shall be void unless the person contracting to sell is, at the time of the making of the contract, the owner or assignee thereof or properly authorized by the owner or assignee or his agent to make such contract. *Wood* v. *Farmer*, 209.

Oral agreement made by landlord after tenancy had begun, to keep steps on premises let in repair, is not invalid as violation of statute of frauds, and conversation between landlord and tenant held on Lord's day, which was principal conversation which resulted in letting, is admissible in evidence to explain conversation as to repairs which occurred afterwards, see LANDLORD AND TENANT, 1.

Implied.

In law.

15. One who, after having become the purchaser of certain real estate from a city at a sale under St. 1888, c. 390, § 40, for the collection of taxes for 1898, pays to the city an amount due for taxes assessed upon the same real

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estate for several years previous to 1898 and for other charges accruing to the city because of sales for the collection of such prior taxes, at which the city had become the purchaser under St. 1888, c. 390, § 48, and receives from the city without any sale under St. 1888, c. 390, § 66, a deed purporting to convey to him all the right, title and interest which the city had received as purchaser under the prior sales, cannot recover from the city the money so paid on the ground that there was a failure of the consideration for which it was paid, since by the making of such payment he was benefited by having the premises released from the liens which the city had thereon to secure the payment of the prior taxes. *Rogers* v. *Lynn*, 354.

In fact.

Unqualified sale of goods by one in possession of them includes implied warranty of right to make sale, and, if no such right exists, purchaser upon returning goods may recover amount paid for them, see SALE, 1.

Implied contract of physician to perform professional services with skill and care, see *post*, 22-24; PLEADING, CIVIL, 3.

Assignment.

16. A corporation as party of the second part made a contract in writing with an individual as party of the first part, whereby, upon another corporation being formed, the party of the first part agreed to acquire a certain amount of its stock and to sell it to the party of the second part for a stipulated price which the party of the second part agreed to pay. An individual joined in the contract as party of the third part, guaranteeing the performance on the part of the party of the second part. The party of the first part fully performed, but the party of the second part did not pay the amount agreed upon. Thereupon the party of the first part executed and delivered an instrument which purported to assign all his rights under the contract to one who in his own name brought an action thereon against the guarantor. The guarantor contended that the contract was not assignable. *Held*, that the contention was not well founded, since, all things necessary to create a liability of the second party to the first party having happened and been performed, the rights of the latter were assignable and the assignee properly brought an action in his own name in accordance with R. L. c. 173, § 4. *Wood* v. *Farmer*, 209.

Performance and Breach.

Of purchase or sale.

17. In an action for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, an averment, that the defendant refused to receive the pig iron or any part thereof and to pay therefor as provided in the contract, is a good allegation of a breach of the contract. *Moffat* v. *Davitt*, 452.

18. In an action against the proprietor of a foundry for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, where the plaintiff contends that the defendant repudiated the contract, the

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plaintiff, for the purpose of showing such repudiation, may show that the defendant delayed the payment of debts in general pertaining to the business outside the plaintiff's contract and that the enterprise had turned out to be unprofitable and the defendant was contemplating an early sale of the plant, while constantly delaying, if not refusing, to receive any part of the five hundred tons of iron ordered from the plaintiff, the market price of which had diminished since the contract was made; and from such evidence the jury can find that the defendant was trying to get out of a bad bargain and had decided not to perform his contract with the plaintiff, and, if the plaintiff has shown that he was ready and willing and offered to perform his part of the contract, they may return a verdict in his favor. *Moffat* v. *Davitt*, 452.

19. The declaration in an action of contract was on an account annexed which contained several items of "coat stands," "hat stands," "hooks" and "sundries cases," with a separate price stated for each item. The answer stated that the defendant "purchased goods of the plaintiff which the plaintiff" delayed the delivery of, causing the defendant damage, which he sought to recover in recoupment. At the trial, it appeared that the goods which the defendant contended were delayed in delivery were not among those described in the declaration, but were a number of wall cases, which were ordered at the same time as the other goods, but at a separate price. It also appeared that all of the goods ordered were of the same general nature, namely, store fixtures and furniture, that $25 was paid on account of the entire order when it was given, and that the wall cases were paid for separately at the time of their delivery at the price previously agreed upon. Evidence as to delay in the delivery of the wall cases and consequent damage to the defendant was excluded, and the defendant excepted. *Held*, that the exception must be overruled, since the contract was separable and the agreement to deliver the wall cases was not, as matter of law, a part of the contract of the plaintiff to deliver the goods described in the declaration, and therefore the damages which the defendant sought to recoup were not suffered in the performance of the contract which was the basis of the action. *Barlow Manuf. Co.* v. *Stone*, 158.

Proper measure of damages in action for breach of contract by which defendant agreed to purchase of plaintiff pig iron and pay for it in thirty days from delivery, where it appears that defendant repudiated entire contract, see DAMAGES, 1.

Attorney's contract with client.

20. Where an attorney at law receives from a client a sum of money to pay the expenses and disbursements and for services of the attorney in procuring bail and defending two persons against whom criminal charges are pending in the Superior Court, "balance to be returned" to the client, and by arrangement between the attorney and the district attorney one defendant pleads guilty and pays a fine as to one charge, and the district attorney agrees not to prosecute the other cases further but to make an entry of *nolle prosequi* therein at a subsequent sitting of the court, the service which the attorney agreed to render to his client is completed, since,

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the district attorney having absolute power to enter a *nolle prosequi* upon his official responsibility, it will not be assumed that his promise will be broken, and since the presence of the defendants in court was not necessary for the making of such entries; and therefore the time has arrived when the attorney should pay to his client any balance left in his hands after deducting from the money the client had paid him the disbursements which he has made and a reasonable charge for his services, and the client need not wait, before bringing an action to enforce his rights, until the formal entries of *nolle prosequi* have been made. *Lizotte* v. *Dloska*, 327.

. At the hearing in review of an action of contract against an attorney at law to whom the plaintiff had paid a sum of money "to be used in obtaining bail and paying all expenses and fines and for services in getting bail, and to defend F. and G. against cases in the Superior Court, balance to be returned to" the plaintiff, it appeared that, at the time when the agreement with the attorney was made, F. and G. were under indictment and in jail, that the attorney procured persons to go on their bail bonds, depositing with one of the bondsmen money as security, and taking from him a receipt stating that "after such defendants have been disposed of in the Superior Court," the deposit less a fee for services as surety should be returned. The attorney in February made an arrangement with the district attorney whereby F. pleaded guilty and paid a fine in one case and the district attorney agreed to enter a *nolle prosequi* in all the other cases at the next, namely, the June sitting of the court. Thereupon, on February 19, the attorney received back from the surety, with whom he had deposited the money as security, the sum so deposited less the surety's fee, and gave to the surety a receipt stating that the cases had "been disposed of by Superior Court on February 15, and therefore the . . . [surety] . . . is held no further as such surety." In April the action which was being tried in review was brought against the attorney. The entries of *nolle prosequi* were not made in the criminal cases against F. and G. until July. The attorney contended that the action was brought against him prematurely. *Held*, that findings were warranted that at the time the action was brought the purposes for which the money had been placed in the attorney's hands had been accomplished and that the action therefore was not brought prematurely. *Ibid.*

Physician's contract for professional services.

22. A husband cannot maintain an action of contract against a physician to recover damages caused by the death of the plaintiff's wife by reason of the defendant's failure to perform his professional services with skill and care when employed by the plaintiff to attend her. *Sherlag* v. *Kelley*, 232.
23. It is settled law in this Commonwealth that unless a remedy is given by statute there can be no recovery for the death of a person wrongfully caused by another, and this rule, as to all elements of damage which arise solely from death, applies to actions of contract as well as to actions of tort. *Ibid.*
24. A husband may maintain an action of contract against a physician for a breach of his implied contract to perform his professional services with

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skill and care when employed by the plaintiff to attend the plaintiff's wife, which caused the plaintiff additional expenses for her nursing, care and treatment, and he is none the less entitled to recover the amount of such expenses because the breach of contract which caused them also caused his wife's death. *Sherlag* v. *Kelley*, 232.

Allegation of breach in pleadings.

Rule of pleading that breach of contract may be assigned in negative of words of contract, and exception thereto, see PLEADING, CIVIL, 2.

Specific performance.

Specific performance of contract for conveyance of land denied because of insufficient description of land in memorandum, see EQUITY JURISDICTION, 6, 7.

Specific performance of contract properly refused because of inequitable conduct of plaintiff, although contract was made by defendant and was not procured by plaintiff by use of such fraud or misrepresentation as would give defendant right to avoid it, see EQUITY JURISDICTION, 4.

Of insurance.

In action on policy of fire insurance, finding by trial judge that plaintiff had used due diligence in complying with requirement of policy that sworn statement should be "forthwith rendered to the company" held to have been warranted, see INSURANCE, 6.

Building contracts.

Non-performance of building contract by contractor held not to have been alleged in "answer in abatement" of owner to contractor's petition to enforce mechanic's lien as to furnish ground for abating petition, see MECHANIC'S LIEN, 2.

Contract with structural company at Everett for sale to it of steel beams containing following "Terms: Cash . . . against invoice and delivery to . . . company at Boston," held to have been performed by delivery at Boston, and the vendor to be entitled, in case he delivered to Everett, to compensation for transportation from Boston to Everett, see *ante*, 5.

Of employment.

Case involving question as to period of time for which plaintiff was employed by defendant and amount of damages defendant should pay plaintiff for discharging him before expiration of such period, plaintiff not having been employed during remainder thereof and contending that, after *bona fide* attempt, he was unable to get employment, see *ante*, 8; DAMAGES, 2; PRACTICE, CIVIL, 16.

CONVERSION.

1. In an action of tort, the declaration covered six and one half pages of the printed record before this court, contained extended allegations of the relations of the plaintiff, an unmarried woman, with one R., a widower, and a statement that R. had agreed to give to the plaintiff certain stocks,

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bonds and securities amounting to $30,000 and to leave her substantially his entire estate by will, that R. made a will and wrote testamentary directions, both of which were in his possession at the time of his death, and "further left to the plaintiff stocks, bonds and money to a large amount . . . all of which belonged to and was the property of the plaintiff," that the defendants, conspiring together to deprive the plaintiff "of all advantages arising to her from a full and complete performance of her contract with R.," made and executed a plan whereby on R.'s death one of them entered the room where he lay and took away the will he had made, the testamentary directions he had written, and all his stocks, bonds and money which were there. There was not in the declaration any description of specific property, nor any other allegation of ownership by the plaintiff than is above set out. The defendant demurred. *Held*, that the declaration did not contain allegations sufficient to maintain an action of tort for conversion. *Thayer* v. *Kitchen*, 382.

2. At the trial before a judge without a jury of an action of tort for the conversion of a certain lot of glue, it appeared that the plaintiff, an "electrical contractor" who never had dealt in glue, made an arrangement with one who was a glue broker and jobber whereby the latter was permitted to use the plaintiff's name and credit in the purchase and resale of glue to be invoiced and billed in the plaintiff's name, and the plaintiff was to receive therefor a commission of two and one half per cent. Upon receipt of the invoice and bill of lading of the glue in question, the plaintiff indorsed it to the defendant and delivered it to the broker for delivery to the defendant, and there was evidence tending to show that the plaintiff also at the same time sent to the defendant a bill for the glue. Evidence of the defendant tended to show that the bill of lading which he received was in the name of the broker and nowhere contained the name of the plaintiff, and that the defendant never received any bill from the plaintiff and did not know that the plaintiff was interested in the transaction. The plaintiff contended that the broker procured the glue from him by fraud, and that therefore the defendant had no title to it. The judge found generally for the defendant and the plaintiff alleged exceptions. *Held*, that the exceptions must be overruled, since the judge must have found that, in making the sale to the defendant, the broker acted as agent for the plaintiff within the scope of his authority, and therefore title to the glue passed to the defendant. *Deane* v. *American Glue Co.* 459.

CORPORATION.

Officers and Agents.

Action against insurance company for slanders alleged to have been published concerning plaintiff by agents of defendant held not to be maintainable because of lack of evidence of authority of agents or of ratification by defendant, see AGENCY, 7.

Non-liability of charitable corporation for torts of agents and servants properly selected, see CHARITY, 6.

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Foreign.

Liability of stockholders.

Action to enforce liability of stockholders in foreign corporation, where main issue was, what was law of country of corporation's domicil on question of liability, see PRACTICE, CIVIL, 4.

Taxation.

Machinery and merchandise of foreign corporation are subject to taxation in town where they are situated, although corporation does not hire or occupy manufactory, store or shop in town, see TAX, 3.

Appointment of commissioner as attorney for service.

Non-compliance by foreign corporation with St. 1903, c. 437, § 58, with regard to appointment of commissioner of corporations as attorney for receipt of service, held not to prevent appointment of receiver of its assets here, see RECEIVER, 2.

Charitable.

What constitutes charitable corporation, and non-liability of such for torts of servants and agents who are properly selected, see CHARITY, 5, 6.

CY PRES.

See CHARITY, 1, 2.

DAMAGES.

In Action of Contract.

1. In an action against the proprietor of a foundry for the alleged breach of a contract in writing to buy of the plaintiff five hundred tons of pig iron and to pay for it in cash in thirty days from the arrival of each car, if the plaintiff shows that the defendant repudiated the contract and wholly refused to receive or pay for any of the iron, the measure of the plaintiff's damages is the difference between the contract price for the whole of the five hundred tons of iron and its market price, which can be shown by the price at which the iron was sold by the plaintiff to other persons in consequence of the defendant's repudiation of his contract. *Moffat* v. *Davitt*, 452.
2. At the trial of an action of contract for salary to the amount of $1,378 alleged to be due to the plaintiff from the defendant, there was evidence tending to show that the defendant had agreed to employ the plaintiff to January 1 of a certain year, and had discharged him without cause in the middle of the preceding September, that according to the agreement of employment there would have been paid to the plaintiff for the period from the time when he was discharged to January 1 the amount claimed in the declaration; and it appeared that the plaintiff made no effort to secure employment during that period and was of the opinion that he could not have secured a position if he had tried to do so, and that in December he was making arrangements to go into business for himself. The trial judge ruled that the measure of damages would be the difference between salary promised to the plaintiff and what he could have earned in some

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other place or occupation, and found for the plaintiff in the sum of $685. The defendant excepted and contended that the plaintiff was entitled to recover only nominal damages. *Held*, that the finding of the judge was warranted. *Maynard* v. *Royal Worcester Corset Co.* 1.

Ad damnum in writ is sufficient allegation of damage in action of contract where special damages are not claimed, see PLEADING, CIVIL, 1.

Damages in action against physician for breach of implied contract in unskilful performance of professional services, see PLEADING, CIVIL, 3.

In Action of Tort.

Assessment of damages in action of tort for trespass against one who interferes with qualified right of plaintiff by removing trees and shrubbery on portion of private way to which he owns the fee subject to rights of passage of other abutters, see TRESPASS, 3.

In order to prove extent of damages suffered by him, plaintiff in action of tort for libel may introduce in evidence statements made by former customers in withdrawing their trade from him to effect that they did so because of statements in libel, see LIBEL AND SLANDER, 7.

Application of rule that action of tort for personal injuries alleged to have resulted from negligence of defendant cannot be maintained without proof of damage which was suffered by plaintiff and which he could not have avoided by conducting himself as reasonably prudent man should have done under the circumstances, see NEGLIGENCE, 52–55.

For Property taken or damaged under Statutory Authority.

3. Under St. 1896, c. 530, authorizing the city of Boston to alter the course of a certain portion of Stony Brook and make for it a new channel, the street commissioners of that city, in making the takings of land and easements necessary for altering the course of the brook, have no occasion to mention the lands of riparian owners on the former course of the brook from which the water is diverted or the water rights of such riparian owners, which necessarily are taken without any such description. *Oelschleger* v. *Boston*, 425.

4. A riparian owner upon the former course of Stony Brook in Boston from whose land the water has been diverted by the action of the street commissioners in altering the course of Stony Brook under authority of St. 1896, c. 530, although no mention of his land or of his rights in the brook is made in the takings of the commissioners, cannot maintain an action of tort for injury to his land from the diversion of the water, because he has a remedy for damages under the statute, which is exclusive, and because the action of the commissioners is lawful. *Ibid.*

5. A person whose property is injured by the obstruction or taking of a private way in the abolition of a grade crossing under St. 1890, c. 428, may recover damages under § 5 of that statute, such injury differing from that ordinarily caused by the discontinuance of a public way in being special and peculiar. *Cutter* v. *Boston*, 400.

6. On the question of the damaging effects upon a petitioner's property of the obstruction of a private way in the abolition of a grade crossing, a

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witness may be found by the presiding judge to be qualified to testify as an expert if it appears that, in addition to a long experience as an auditor in this class of cases and as a former judge of the Superior Court, he is the owner of the legal title to and the manager of an estate adjoining the petitioner's property and has been familiar with the neighborhood for many years, although he does not profess to have much knowledge of the market price of real estate there, he not being asked to state the damage in money but only the general effect of the change upon the petitioner's estate and the percentage of value taken away. *Cutter* v. *Boston*, 400.

In Equity.

Justifiable refusal by court to retain for assessment of damages suit in equity for specific performance, see EQUITY JURISDICTION, 5.

Nominal.

Case where finding by trial judge that plaintiff was entitled to more than nominal damages for breach of contract by defendant to employ him was held to be warranted by evidence, see *ante*, 2.

Recoupment.

Defendant in action of contract for purchase price of goods sold and delivered was not allowed to recover in recoupment damages for delay in delivery of other goods, not referred to in declaration but included in order given to plaintiff, because contract for purchase of goods was separable, see CONTRACT, 19.

DEATH.

Legislation in this Commonwealth giving remedy for death caused by negligence of persons or corporations or unfitness or negligence of their servants or agents reviewed, and amendment of R. L. c. 171, § 2, contained in St. 1907, c. 375, held not to apply to remedy given by St. 1906, c. 463, Part I. § 63, see NEGLIGENCE, 66, 67.

Application to action of contract by husband against physician for unskilful performance of professional services which resulted in death of plaintiff's wife, of rule that, unless remedy is given by statute, there can be no recovery for death of person wrongfully caused by another, see CONTRACT, 22–24.

Actions for injuries causing death, see NEGLIGENCE, 3, 7, 10, 20, 30–32, 47, 59, 72.

DECEIT.

False Representation to induce Purchase.

1. A statement by the seller of a mortgage that it is a first mortgage, made to induce its purchase when he knows it to be a second or a third mortgage, is a representation of a material fact and not mere seller's talk. *Rollins* v. *Quimby*, 162.
2. If a married woman and her husband acting as her agent, both of whom are inexperienced in business, are induced to exchange a farm and live stock, belonging to the woman, for three mortgages by false and fraudu-

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lent representations of the owner of the mortgages that they are "first mortgages just as good as money in the bank," when in fact one of the mortgages is a second mortgage, and another of them is a third mortgage, and, in making the exchange relying on this representation of the seller of the mortgages, they are led by their confidence in him to refrain from making an examination of the papers and by his assurance that it is unnecessary to employ a lawyer are led to refrain from doing so, the woman is not precluded, by the fact that she and her husband did not examine the records in the registry of deeds nor by the fact that they did not read the provisions of the mortgages, from recovering any damages which she may have sustained in consequence of the fraud. *Rollins* v. *Quimby*, 162.

By Conduct without Words.

8. In an action, against a corporation called a stock exchange, under R. L. c. 99, §§ 4–6, to recover money paid on margins on wagering contracts, the only defense relied upon consisted of releases signed by the plaintiff, which the plaintiff contended were obtained from him by fraud. There was evidence that the plaintiff was a foreigner, sixty years of age, who for many years had been employed as a coachman and was inexperienced in business, that each of the releases was given in connection with the settlement of transactions between the parties in which a balance was paid to the plaintiff for which he receipted, signing his name at a shelf at the cashier's window, that the cashier placed on the shelf the contract with a receipt upon it containing a statement of the amount to be received by the plaintiff plainly written, while stamped also on the back of the contract by a rubber stamp dimly in fine print was the release, that the cashier in placing the paper before the plaintiff to sign put his hand over a part of the matter that was stamped on it, and that the plaintiff "supposed he was signing it for the money he got." There was evidence in regard to the manner in which the defendant conducted its business showing circumstances which the jury might find would lead the plaintiff naturally to believe that on each occasion when he signed a release the defendant was presenting a mere receipt for his signature. *Held*, that, although no untrue words were spoken to the plaintiff, there was evidence on which the jury might find that the plaintiff was induced to sign the releases by wilfully false representations made by the conduct of the defendant. *Larsson* v. *Metropolitan Stock Exchange*, 367.

DEED.

Construction.

A boundary line described in a deed as running in a certain direction by a private way includes the fee of the land to the centre of the private way, if it belongs to the grantor, unless the deed by explicit statement or necessary implication requires a different construction, and the fact that the monument at one end of the boundary on the way is stated to be in the line of the way does not require a different construction. *Pinkerton* v. *Randolph*, 24.

Construction of trust created by deed conveying land to trustee "to pay over

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to" trustee's father and mother, "during their joint lives and then to the survivor, during the life of the survivor, the rents and profits, or at their ——— to allow them to occupy said estate and at the decease of the said survivor convey said premises to their heirs at law," see TRUST.

DESCENT AND DISTRIBUTION.

Where legal title to land is held by husband in trust for others, it does not on his death descend to his wife as one of his statutory heirs, see HUSBAND AND WIFE.

DEVISE AND LEGACY.

Specific or general.

1. The will of one, who, at the time it was made and at the time of his death, owned three hundred seventy-five shares of the capital stock of a certain corporation, contained the following provision: "I give and bequeath to my steadfast friend . . . [P] . . . one hundred twenty-five shares of the capital stock of . . . [the corporation] . . . together with all the rights and privileges which now or hereafter appertain to the same." Within a year after the death of the testator, dividends were declared and paid upon the three hundred seventy-five shares of stock in the hands of the executor and the portion thereof corresponding to the one hundred twenty-five shares was $825. The executor brought a bill in equity for instructions as to whether or not such $825 should be paid to P. *Held*, that the $825 should be paid to P., since the words, "together with all the rights and privileges which now or hereafter appertain to the same," indicated that the testator meant the legacy to be specific, and required that the one hundred twenty-five shares of stock should be set apart and, at the end of a year from the testator's death, should be turned over to the legatee with any increment which had accrued upon them after the testator's death. *Thayer* v. *Paulding*, 98.

What Estate.

2. In interpreting the will of a testatrix, who was a widow, the fact that her husband by his will expressly gave to the survivor of his children the power to dispose of such survivor's interest in the remainder of the estate, the fact, which might be inferred, that the testatrix was acquainted with the contents of her husband's will, and the fact that she did not make a similar provision, do not show an intention of the testatrix that her children should not have the power to dispose of their respective interests in the remainder of her estate. *Jewett* v. *Jewett*, 310.
3. In interpreting the will of a testatrix, a careful provision in the will, that the shares of the income of a trust fund which were to be paid to her daughters or to their female descendants should be paid to them independently of their husbands, does not warrant the inference that the testatrix wished to deprive her daughters of any interests in remainder lest they should exercise their unrestricted power of disposition by bequeathing such interests to their husbands. *Ibid.*
4. Where one undivided third of certain real estate is devised to a trustee

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"the net income . . . to pay to my son E. during his life, or to permit him to occupy and enjoy the use of said property in common with his brothers as he may prefer," the right of E. to one third of the income is an equitable interest which can be reached by his creditors by a bill in equity at any time when he chooses to receive such income rather than to avail himself of the permission given him to occupy the property in common with his brothers; but, while he is availing himself of the privilege of such occupation, he has no right which his creditors can reach, since such privilege is personal to him and unassignable and inalienable. *Cashman* v. *Bangs*, 498.

5. A son made an agreement in writing to convey in fee simple certain real estate, the title to which he claimed under the following provisions in his father's will: "I devise to my son all the real estate of which I may die possessed and he shall hold the same to him and to his heirs forever, provided however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then and in either of such cases, my will is that my brother and my sister shall have and take all my real estate remaining at the death of my son, share and share alike, to them and to their heirs forever." The testator died seised of several distinct parcels of land. The person to whom the son had agreed to convey the real estate refused to receive a deed, contending that the son could not convey a title in fee simple. The son thereupon brought a bill in equity to enforce specific performance of the agreement. *Held*, following Kelley *v.* Meins, 135 Mass. 231, and Ide *v.* Ide, 5 Mass. 500, that by the words "all my real estate remaining at the death of my son" was meant such property as the son should not have disposed of during his life, that the son took an estate in fee simple, that the attempted limitation over was void, and therefore that the bill might be maintained. *Galligan* v. *McDonald*, 299.

To "Heirs."

6. A testatrix died, leaving a son and two daughters. By her will she gave to her son one fourth of all the residue of her estate. The other three fourths she gave to trustees, with provisions that the income should be paid primarily to her daughters, but in certain events in part to her son and in part to the descendants, if any, of her daughters. The will then provided that the trustees "on the decease of the last survivor of my said daughters" shall "convey, assign, deliver and distribute the whole remaining trust property to the then surviving descendants of my said children respectively, . . . and in case of there then being no surviving descendents of any of my said children, then the trust property is to go to my heirs and in either case the trust is to cease." All of the three children of the testatrix died without issue. Upon the death of the last survivor of them, who was one of the daughters, the trustees brought a bill for instructions as to whether the persons designated as the "heirs" of the testatrix, among whom it was their duty to distribute the property, were her three children, who were her heirs at the time of her death, or were certain collateral kindred of the testatrix, who would have been her heirs had she died at the time of the death of the last survivor of her children. *Held*,

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that the will contained no manifestation of an intent to designate by the word "heirs" any other persons than those who were the heirs of the testatrix at the time of her death; that the facts, that her heirs at the time of her death were her children, that an absolute bequest was made to her son, and that life interests were given to her daughters, did not indicate an intention that these same children should not take finally as her heirs after the termination of the limitations made by her will. *Jewett* v. *Jewett*, 310.

Power.

7. Where a testator has the income of a fund for life, with a power of disposing of the principal by will, a residuary bequest in his will should be construed to be an execution of that power, unless the will shows that such clause was not intended so to operate. *Howland* v. *Parker*, 204.
8. A husband and wife executed with a trustee an agreement in writing whereby they agreed to live apart and the trustee received $5,500 "to be deposited in . . . banking institutions," from which and its income he was to pay to the wife $250 semiannually. The agreement also provided that, on the death of the wife, the trust should terminate and the fund be paid "to such persons or be disposed of in such manner as" the wife "shall by her last will direct," but that, "in the event of" the wife "dying intestate," the fund should be paid to the husband. The wife afterward died leaving a will which contained, besides a specific devise and various specific bequests of personal belongings which had been given to her by the legatees, a clause, the seventh, directing that, after the payment of the debts of the testatrix, the expenses of her funeral and of the administration of her estate, and the delivery of the specific bequests, "the remainder of the money securities or deposits belonging to my estate" should be held in trust for a certain cousin, and that, upon the decease of that cousin, the trust for her benefit should terminate and "said trust estate shall then revert to my general estate and be paid to . . . [C.] . . . as hereinafter provided." The eighth clause of the will provided that "all articles of personal property belonging to me at my decease, which are not herein specifically bequeathed or designated to be held in trust, . . . I give devise and bequeath to . . . [C]." Upon the husband's claiming the fund in the hands of the trustee under the agreement of separation, the latter refused to deliver it to the executor of the will of the wife, and the executor brought an action of contract to recover it. The husband was summoned in to defend against such action as claimant. *Held*, without deciding whether or not the power given to the wife by the terms of separation agreement was executed by the seventh clause of her will, that, if it was not executed by the seventh clause, it was by the eighth, which was a residuary clause, and therefore that the fund should be paid to the executor of the wife's will. *Ibid.*

DISTRICT ATTORNEY.

Promise of district attorney to make entry of *nolle prosequi* in criminal case at next term of court held tantamount to making of such entry so far

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as completion of services of attorney for defendant was concerned, see CONTRACT, 20, 21.

ELECTION.

Commencement of action of contract for balance due to vendor under contract of conditional sale held to be such election to treat sale as absolute as will bar action of replevin to reclaim goods, see SALE, 2.

ELECTIONS.

Various rulings at trial of one charged with wilfully performing contrary to law duties imposed upon him as election officer, in making false count and report of votes, see FALSE COUNTING AND REPORTING OF VOTES, 1–4.

ELEVATOR.

Action against proprietor of factory to recover for death of boy employee who fell down elevator well, gate being up, see NEGLIGENCE, 3.

Action by employee in mill against employer to recover for personal injuries alleged to have been received by reason of plaintiff's being crushed against post by sudden opening of doors in floor to permit freight elevator to come up, see NEGLIGENCE, 40, 41.

EMBALMING.

Registration in embalming, see that title.

EMPLOYERS' LIABILITY ACT.

Notice.

1. While the giving of a sufficient statutory notice to an employer under R. L. c. 106, § 75, is a condition precedent to recovery by an employee, his administrator or his next of kin under §§ 71–73, such a notice is not to be construed with technical precision. *Herlihy* v. *Little*, 284.

2. The purpose of the notice to an employer by an employee, his administrator or his next of kin, which by R. L. c. 106, § 75, is required as a condition precedent to recovery under §§ 71–73, is to give to the employer information as to the time, place and cause of the employee's injury, and not to advise him specifically as to its details or effects. *Ibid.*

3. A notice from an employee, his administrator or his next of kin to his employer under R. L. c. 106, § 75, which contains a statement of facts which is incorrect as to a subject matter not required to be stated, is not invalidated thereby if it also contains a sufficient statement of the time, place and cause of the employee's injury. *Ibid.*

4. After a notice has been given to an employer by the administrator of an injured employee under R. L. c. 106, § 75, which states in sufficient detail the time, place and cause of the injury to the employee, and also that the employee "received personal injuries resulting in death preceded by

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conscious suffering," the dependent next of kin of the employee are not precluded from bringing without a further notice an action under § 73 for death of the employee without conscious suffering. *Herlihy* v. *Little*, 284.

Negligence of one in employ of Boston Elevated Railway Company and in control of signal in subway in Boston is not negligence of person in control of signal on railroad within meaning of R. L. c. 106, § 71, cl. 3, see NEGLIGENCE, 17.

Actions by employees against employers under R. L. c. 106, § 71, see NEGLIGENCE, 8–21, 33, 34, 42.

EQUITY JURISDICTION.

Laches.

Demurrer to bill in equity to compel reconveyance of land obtained by fraud held rightly to have been sustained because on allegations of bill remedy was barred by laches of plaintiff, see *post*, 9.

Smallness of Plaintiff's Claim.

In bill by policy holder against insurance company for accounting as to tontine fund, in which plaintiff alleged fraud and mismanagement by defendant, lack of allegation showing that amount of damage to plaintiff was sufficient to warrant maintenance of bill, was held not to be fatal, see *post*, 1.

For an Accounting.

1. A demurrer to a bill in equity against a life insurance company by the holder of a policy therein seeking an accounting and alleging that under the provisions of the policy the defendant had agreed to "apportion equitably" to the plaintiff the share of his policy in a certain fund and that such equitable apportionment had not been made, but that the defendant had refused to render to him an accounting of its use of such fund and had fraudulently and dishonestly misappropriated and mismanaged it will not be sustained for lack of an allegation showing that the damage sustained by the plaintiff from the alleged wrongful acts of the defendant was not too small to warrant equity in interfering. *Peters* v. *Equitable Life Assurance Society*, 579.
2. While it is true that a bare charge, contained in a bill in equity against a life insurance company by the holder of a policy issued by the company, that the defendant or its officers had been guilty of fraud which lessened the amount which equitably should have been paid to the plaintiff under the terms of the policy, without the acts of fraud being specified, would not be sufficient for the maintenance of the bill on the ground of such fraud, nevertheless the following allegations would be sufficient: That the defendant paid to its executive officers unnecessarily large and exorbitant salaries, improperly and unlawfully paid large sums of money as contributions for the campaign expenses of both of the two leading political parties, had invested its funds in large office buildings in bad faith and from dishonest motives, valuable portions of which buildings were rented

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to its officers and their relatives at prices much below their true rental value, managed its deposits in a way to benefit certain banking institutions whose officers were also officers of the defendant, participated with its funds in various speculative enterprises, whose securities officers of the defendant sold to it at exorbitant prices to their own profit, and expended large sums of money improperly in public entertainments. *Peters* v. *Equitable Life Assurance Society*, 579.

3. A bill in equity against an insurance company by the holder of a policy of life insurance issued by the company contained the following allegations: That the policy provided that, at the expiration of a period of time called the tontine dividend period, all surplus of profits derived from similar policies which should not then be in force should be apportioned equitably among such polices as should have completed such periods, and that thereupon the plaintiff should have the option "to withdraw in cash this policy's entire share of the assets, i. e. the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to his policy, or to use his share in payment for future insurance; that the tontine dividend period as to the plaintiff's policy had passed, that the defendant had not equitably apportioned the surplus due to the plaintiff and had not furnished him any accounting as to such fund, but that it had refused to do so. There were also allegations, sufficiently specific, as to fraud, dishonesty, and wrongful misappropriations by the defendant in the management of the tontine fund. There was no averment that the plaintiff had exercised his option as to the disposition of the share of the assets that had been or should be allotted to his policy. The bill prayed that the defendant be ordered to account, that the share which should be apportioned to his policy be ascertained and paid to him, and that the damages sustained by him be assessed and paid to him. The respondent demurred. *Held*, that, under the allegations as to fraud, dishonesty and wrongful misappropriations by the defendant, the plaintiff had a right, before he exercised the option given him in the policy, to maintain his bill in order to ascertain what was equitably due to him under the terms of his policy. *Ibid.*

Suit in equity, by one of members of copartnership against person to whom he had paid certain money of partnership and assigned certain property of his own, both to be used for benefit of firm, for accounting, held to have been brought properly by plaintiff alone, his agreement with defendant having been made by him as trustee for firm, see EQUITY PLEADING AND PRACTICE, 2.

Specific Performance.

4. The plaintiff in a bill in equity seeking specific performance of an agreement to sell and convey certain real estate does not have an absolute right to a decree ordering specific performance merely because the agreement was made by a defendant competent to make it, was sufficient upon its face and was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it; but the granting of such a decree rests in the sound discretion of the court, and, where the judge also finds

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facts tending to show that, in inducing the defendant to make the agreement, the plaintiff was guilty of unfair conduct or took any inequitable advantage of the defendant, he may refuse the decree, although the plaintiff was not under any fiduciary relation to the defendant. *Banaghan* v. *Malaney*, 46.

5. At the hearing of a suit in equity for specific performance of an agreement in writing by the defendant to convey certain real estate to the plaintiff, the judge found that the agreement was made by the defendant, who was legally competent to make it, that it was sufficient on its face, and that it was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it; but he also found that, because of unfair and inequitable conduct on the part of the plaintiff in procuring the agreement specific performance should be refused, and dismissed the bill. The plaintiff appealed and contended that the suit should have been retained for the assessment of damages. There was no prayer for damages in the bill, and it did not appear that the plaintiff had requested that his damages be assessed. *Held*, that the appeal should be dismissed, since the court was not bound to retain the bill for the assessment of damages. *Ibid.*

6. It is not necessary for the plaintiff in a bill in equity, seeking specific performance of an agreement by the defendant to convey certain real estate to him, to allege that the defendant owned the real estate which he had agreed to convey. *Harrigan* v. *Dodge*, 357.

7. A bill in equity, for the specific performance of an alleged agreement by the defendant to convey to the plaintiff certain real estate described at length in the bill, set forth as memoranda of the agreement two receipts, one signed by an agent of the defendant for $100 "on account of sale of the three houses belonging to the F. D. estate in Danvers," and the other signed by the defendant for $25 "on acct. of sale of the three houses & land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate." There was no allegation that the three houses referred to in the memoranda were the only ones owned by the F. D. estate in Danvers. The defendant demurred on the ground that the memoranda were not sufficient to satisfy the statute of frauds, R. L. c. 74, § 1, cl. 4, the demurrer was sustained and the plaintiff appealed. *Held*, that the demurrer was sustained rightly, since the descriptions contained in the memoranda were not sufficiently definite and there was no allegation in the bill to make them more so. *Ibid.*

Suit in equity to compel specific performance of agreement to convey real estate maintained because, on construction of will under which plaintiff received title to land, contention of defendant that he could not convey title in fee simple was held to be unfounded, see DEVISE AND LEGACY, 5.

Marshalling.

8. The general doctrine, that the equitable rule of marshalling assets for the protection of a junior creditor by compelling a senior creditor to resort first to a fund or security which the junior creditor cannot reach, will be confined to cases, where two or more persons are creditors of the

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same debtor and have successive liens upon the same property while the creditor prior in right also has other security belonging to the same debtor and not available to the holder of the junior lien, and will not be enforced to the detriment of the prior creditor. *Adams* v. *Young*, 588.

To reach and apply Equitable Assets.

Suit in equity to reach and apply to payment of debt owed to plaintiff by defendant interest of defendant in undivided interest in certain real estate, held in trust, the net income of which was to be paid to him during his life or the trustee was "to permit him to occupy and enjoy the use of said property in common with his brothers as he may prefer," where it appeared that defendant had made an unrecorded assignment of his share of any proceeds that might be realized from the sale of property in his lifetime, see DEVISE AND LEGACY, 4; ASSIGNMENT.

To recover Land sold at Void Foreclosure Sale.

Where mortgagee fraudulently alters mortgage deed after its delivery so that it includes other land than that conveyed, and then holds foreclosure sale of entire premises, remedy of mortgagor is by real action and not by bill in equity, see REAL ACTION.

To compel Reconveyance of Land obtained by Fraud.

9. A bill in equity alleged that the defendant by deceit and fraud induced the plaintiff's father to execute and deliver to him in April, 1890, a conveyance of certain real estate and a mortgage of certain other real estate, that the plaintiff's father died intestate in October, 1890, and that a brother of the plaintiff was appointed administrator of his estate, that thereafter in 1891 the mortgaged property was advertised for sale by the defendant for breach of condition in the mortgage, that the plaintiff attended the sale and protested against it, declaring the mortgage to be fraudulent and to have been obtained by false pretenses by the defendant, that, after one adjournment of the sale, the mortgaged property was sold to one R., "the subservient tool and confidential agent of the defendant" for $3,000 after the plaintiff and the administrator of the estate of the father had bid $6,000, and was immediately conveyed by R. to the defendant. It also was alleged that the plaintiff was absent from this State from 1891 until the middle of 1902, that he was advised repeatedly by the administrator that his counsel and the defendant's counsel were negotiating and in progress of effecting a settlement, that the two counsel "were, tacitly if not actually, in harmony to postpone and prevent any settlement"; that many portions of the land had been sold to persons who were not parties to the suit, and that in 1903 the plaintiff had obtained an assignment from the administrator of the right to bring the suit. The bill contained no offer to pay what might be found to be equitably due to the defendant from the estate of the plaintiff's father. It was filed in October, 1906, and, except as above stated, contained no excuse for delay. The defendant demurred. *Held*, that the demurrer

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should be sustained because of laches of the plaintiff, because of lack of necessary parties, and because of lack of an offer of the plaintiff to pay to the defendant upon a reconveyance what might equitably be due him. *Marvel* v. *Cobb*, 293.

Fraud.

Bill in equity against life insurance company for accounting as to amount due to plaintiff under terms of tontine policy of life insurance, in which plaintiff alleged that company had fraudulently insured its property and diminished tontine fund, see *ante*, 1–3.

Bill in equity to compel reconveyance of land alleged to have been obtained by fraud, see *ante*, 9.

To enjoin Unlawful Interference with Business.

Suit may be maintained in equity by building contractor to enjoin members of labor union, who are engaged in lawful strike, from causing those of his employees who are members of union to leave his employ by threatening to impose fines under by-law of union, see UNLAWFUL INTERFERENCE.

Receiver.

Suit of domiciliary receiver of foreign corporation for appointment of himself as receiver in this State to be ancillary to himself as receiver in State of incorporation, where there were involved rights of attaching creditors here, see RECEIVER, 1, 2.

To set aside Sale of Merchandise in Bulk.

Bill in equity to set aside sale of merchandise in bulk because requirements of St. 1903, c. 415, were not complied with, dismissed because purchaser, acting in good faith, paid off two mortgages on the goods of one of which he took assignment and of other discharge, see SALES OF MERCHANDISE IN BULK.

Damages.

Court not bound to retain for assessment of damages suit in equity for specific performance of contract, where judge finds that contract was made by defendant and was not obtained by such fraud or misrepresentation as would give defendant right to avoid it, but that because of inequitable conduct of plaintiff specific performance should be refused, and where bill contains no prayer for damages, see *ante*, 5.

EQUITY PLEADING AND PRACTICE.

Bill.

Allegation of ownership of land by defendant unnecessary in bill in equity seeking specific performance of contract to convey real estate, see EQUITY JURISDICTION, 6.

Allegations of fraud in bill by policy holder against life insurance company for accounting as to tontine fund held to be sufficient, see EQUITY JURISDICTION, 1–3.

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Bill of policy holder against insurance company for accounting as to tontine fund, in which plaintiff alleges fraud and mismanagement by defendant, need not contain allegation showing that amount of damage to plaintiff will warrant maintenance of suit, see EQUITY JURISDICTION, 1.

Bill in equity for specific performance of contract held properly not retained by court for assessment of damages, where judge found that contract was made by defendant and was not procured by plaintiff by use of such fraud or misrepresentation as would give defendant right to avoid it, but that specific performance should be refused because of inequitable conduct of plaintiff, and where bill contained no prayer for damages, see EQUITY JURISDICTION, 5.

Demurrer.

1. Where a bill in equity is based upon a contract made in another State and governed by the law of that State, but contains no allegations as to the laws of that State, the question, whether under such law the contract is enforceable by the bill in equity, cannot be raised by demurrer. *Peters v. Equitable Life Assurance Society*, 579.

Parties.

2. In a suit in equity by a member of a partnership against a third person for an accounting, where it appeared that the plaintiff assigned to the defendant a mortgage worth $675 belonging to the plaintiff individually and $250 of money belonging to the partnership, both to be used by the defendant in paying the creditors of the firm, and the defendant admitted that the $250 was not applied by him to the payment of the debts of the firm, but contended that as the money belonged to the partnership it could be recovered only in a suit brought by all the members of the partnership, it was *held*, that the agreement between the plaintiff and the defendant so far as it related to partnership property, was made by the plaintiff as trustee for the firm, and that the action was brought properly in the name of the trustee. *Rosenberg* v. *Schraer*, 218.

Demurrer to bill in equity to compel reconveyance of land obtained by fraud held rightly to have been sustained because parties to whom portion of land had been sold by defendant were not made parties, see EQUITY JURISDICTION, 9.

Master.

3. While it is true that in a suit in equity an exception to a master's report, which is based upon an objection to the master's making a ruling of law that upon the facts reported by him the plaintiff was entitled to no relief against the defendant, is well taken as an abstract proposition, it becomes immaterial where it appears that all the facts are reported by the master. *Adams* v. *Young*, 588.

Master's Report.

4. Where a master's report states findings made by him which are sufficient to dispose of the case and does not report the evidence on which his find-

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ings were made, it must be assumed that the evidence warranted the findings. *Wilson* v. *Puffer Manuf. Co.* 261.

Exception to master's report based upon master's making ruling of law on facts found by him is well taken as abstract proposition, see *ante*, 3.

Exceptions to Master's Report.

Exception to master's report based upon master's making ruling of law on facts found by him is well taken as abstract proposition, but becomes immaterial where all facts upon which ruling is based are in report, see *ante*, 3.

Costs.

5. In a suit in equity by a creditor to reach and apply in satisfaction of a debt due to the plaintiff from the principal defendant equitable assets of the principal defendant in the possession of a second defendant, where it is determined that the principal defendant owes the plaintiff as alleged, a decree, that a sale of the principal defendant's interest in the equitable assets be made and that from the proceeds there shall be paid among other items "taxable costs" to the second defendant, is not objectionable in failing to award to the second defendant costs "as between solicitor and client" since the determination of costs is a matter within the discretion of the presiding justice and nothing appears to show that such discretion was not exercised properly. *Cashman* v. *Bangs*, 498.

Decree.

Decree appointing as ancillary receiver of foreign corporation one who also was receiver in State of incorporation should direct ancillary receiver not to transmit Massachusetts assets to himself as receiver in such other State until provision has been made for creditors who have made attachments here, see RECEIVER, 1.

Exceptions.

6. *It seems*, that the question as to whether a judge, before whom a suit in equity was heard, ruled properly as to the admission or exclusion of evidence, can be presented to this court only by a bill of exceptions, if exceptions to the rulings were taken at the hearing, or by a reservation under R. L. c. 159, § 29. *Thornley* v. *J. C. Walsh Co.* 179.

Reservation.

Question of correctness of rulings of judge at hearing of suit in equity can be brought before this court only by reservation under R. L. c. 159, § 29, or by exceptions, see *ante*, 6.

Report.

"Report of facts" filed by judge in equity suit five months after decree is not effectual to bring before this court question of whether certain rulings made by him as to admission and exclusion of evidence were correct, where only an appeal was taken from the decree and no exceptions were filed, see *post*, 9.

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Appeal.

7. Upon an appeal from a decree overruling exceptions to a master's report in a suit in equity, this court may draw inferences of fact from the facts reported by the master, whether the master drew such inferences or not. *Rosenberg* v. *Schraer*, 218.
8. Where on an appeal by the plaintiff in a suit in equity from a decree dismissing the bill, the record showed that the plaintiff filed exceptions to a master's report but did not show that his exceptions were overruled, the defendant stated in his brief before this court that the plaintiff's exceptions to the report were overruled, the case was argued by both parties upon that assumption, and the court considered the case upon that basis. *Wilson* v. *Puffer Manuf. Co.* 261.
9. The question as to whether certain evidence offered by the defendant at a hearing in a suit in equity properly was excluded by the judge is not before this court on an appeal from a decree made by the judge granting the prayer of the bill, no bill of exceptions having been filed, although, five months after the decree, the judge made a "report of facts" in which he stated that such evidence was offered and was excluded by him at the hearing. *Thornley* v. *J. C. Walsh Co.* 179.

ESTOPPEL.

The mere receipt by one, who is beneficially interested in a fund deposited in a bank by a judge of probate as unclaimed funds of an estate under R. L. c. 150, § 23, of a notice which should have been given to the judge and which, if it had been given to the judge, would have caused interest to cease to accumulate on the amount so deposited, does not estop the person receiving the notice nor his administrator after his death from contending that the notice had no effect because it was not given to the judge. *Cole* v. *New England Trust Co.* 594.

After defendant in action for purchase price of certain goods has returned goods to plaintiff with statement that they were not what he ordered, he is not estopped from further contending that his signature to written order therefor was procured by fraud of plaintiff's agent, see CONTRACT, 13.

One who, under assurance by seller that certain mortgage is first mortgage and that he need not have title examined, purchases it without having title examined and without reading provisions in mortgage, is not by such facts estopped to maintain action against seller for deceit on mortgage turning out to be second or third, see DECEIT, 2.

EVIDENCE.

Presumptions and Burden of Proof.

1. There is no presumption that a letter, addressed by a bank to the register of probate of a certain county under his official title, which contains statements with regard to a deposit of an unclaimed portion of an estate made

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in the bank in the name of the judge of probate of that county under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 28, by the administrator of the estate, will be given by the register to the judge. *Cole* v. *New England Trust Co.* 594.

Prima facie case which, in action by passenger against street railway company for injuries due to derailment of car, is proved by plaintiff's showing derailment, may be met and overthrown by evidence of defendant showing that it used all care called for by circumstances, see NEGLIGENCE, 51.

Where there are in evidence, at trial in Superior Court on appeal from Land Court of issue framed there, not only report of his findings by judge of Land Court but also other evidence in support thereof, ruling that verdict be directed for appellant is refused rightly, see BOUNDARY.

Action by employee against employer cannot be maintained if evidence leaves it matter of conjecture whether cause of injury was such as to render employer liable, but may be maintained if evidence is such that jury properly may find that, by fair preponderance, it is shown that cause was one which makes employer liable, see NEGLIGENCE, 21.

Matters of Common Knowledge.

Judge hearing case without jury is not precluded from using his own knowledge of practical affairs or applying his judicial sense to the consideration of matter of such common occurrence as securing employment, see PRACTICE, CIVIL, 16.

Admissions and Confessions.

Letter offered in evidence as containing admissions binding upon defendant held inadmissible for that purpose because it did not appear that person who wrote letter was authorized to make such admissions, see AGENCY, 6.

Statement by insured, on day after his property was destroyed by fire but before he knew of that fact, that policy thereon had been cancelled and that no liability attached to the insurer, held to be evidence warranting judge, before whom an action on the policy was tried, in finding that insured had assented to cancellation of policy, see INSURANCE, 5.

Res ipsa loquitur.

See NEGLIGENCE, 34, 50.

Best Evidence.

Official tally sheets kept by defendant indicted for wilfully making false count and report of votes in election are best evidence to show that count was kept by him, see FALSE COUNTING AND REPORTING OF VOTES, 1.

At trial of election officer charged with making false count and report of votes, it is not necessary to produce original ballots to show what true count of votes was, but official registrars may testify, refreshing recollections from sheets used by them at recount, see FALSE COUNTING AND REPORTING OF VOTES, 3.

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Remoteness.

2. It is within the discretion of a single justice, before whom is being tried on appeal from the Probate Court an issue as to the sanity of a testator at the time of the execution of an alleged will, to designate a limited period of time, evidence as to acts and events within which bearing on the issue would be admitted and other evidence excluded as remote; and it is not an unreasonable exercise of such discretion, at the trial of such an issue regarding a will executed by a woman sixty-two years of age, whom those objecting to the proof of the will contended was suffering from congenital insanity, to set as such limit a time six years before the time when the will was executed. *Hardy* v. *Martin*, 548.
3. At the trial, on an appeal from a decree of the Probate Court disallowing a will, of an issue as to the soundness of mind of an alleged testator on May 20, 1905, the time of the execution of the instrument offered for probate as his will, the presiding justice without objection by the petitioner "fixed January 1, 1901, as the reasonable limit of time as to which evidence of the condition of the testator could be introduced." The contestants offered evidence as to acts and conduct of the alleged testator between January 1 and January 3, 1901, tending to show such unsoundness, and also the opinion of a physician, who attended the testator from January 8 to February 19, 1901, that he was not then of sound mind, and the evidence was admitted, the petitioner alleging an exception solely on the ground of remoteness. *Held*, that the exception must be overruled, the question as to whether the evidence was too remote being one to be determined by the presiding justice in his discretion, and there being nothing to indicate that such discretion was not exercised rightly. *Jenkins* v. *Weston*, 488.
4. In an action for personal injuries from being run into from behind by an automobile of the defendant as the plaintiff, with two companions, was walking on a State highway on a very dark evening, the plaintiff and one of his companions testified that they looked back and saw the defendant's automobile approaching with only one light in front, which led them to think that it was an electric car which would pass them on the track by the side of which they were walking. The defendant called as a witness the chauffeur who was driving the automobile at the time of the accident. He testified that there were four lights on the car and that they all were lighted. On cross-examination he testified that he understood that the law required him to have the number of the machine on the lights or on any two lights in front. He was asked, "Were there any numbers on either light?" and answered "No." At the defendant's request and against the plaintiff's objection, the presiding judge struck out this answer and refused to allow the plaintiff to go into the matter. The plaintiff excepted. He contended that the testimony that there were no numbers on the lamps furnished a reason for not lighting the lamps and therefore would have tended to affect the weight to be given to the testimony of the chauffeur and to corroborate the evidence of the plaintiff that only one lamp was lighted on the automobile. *Held*, that the exception must be

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overruled, as the judge well might have thought that the connection between the absence of numbers on the lamps and the accident was so remote as to render the evidence of no value, and, if he thought so, its exclusion was proper. *Belleveau* v. *S. C. Lowe Supply Co.* 237.

Proper exercise of discretion of trial judge in excluding, on cross-examination of witness, questions relating to matters remote from issues of case, see WITNESS, 1.

Res Gestae.

5. In an action, by a boy nineteen years of age when injured, for personal injuries from being run into from behind by an automobile of the defendant as the plaintiff with two companions of about his own age was walking on a State highway on a very dark evening, there was evidence that as the three boys walked along they were taking precautions against anything coming from behind, and that they listened and in turn looked back. The plaintiff offered to show, as bearing on the question of his due care, that just before the accident one of his companions turned and looked back and said, "There are two cars coming," and then looked back a second time and said, "Let's hurry up, we can catch the second car at Reed's Corner." By other evidence it appeared that what they mistook for the second car was the automobile that ran down the plaintiff. The judge excluded the evidence offered by the plaintiff. *Held*, that this exclusion was error; that it was a question for the jury whether the plaintiff and his companions had not the right to rely upon each other, and that, if they were justified in relying upon each other, what one said to the others as he turned and looked back was competent, in connection with other facts in the case, to show the circumstances under which the plaintiff acted. *Belleveau* v. *S. C. Lowe Supply Co.* 237.

In action of tort for libel, evidence of statements by former customers of plaintiff, made in withdrawing their trade, to effect that they did so because of statements in libel, is admissible on question of damages, see LIBEL AND SLANDER, 7.

Opinion: Experts.

6. The exclusion of the testimony of a witness, offered as that of a medical expert, on the ground that the witness has not had sufficient medical experience to qualify him as such an expert, is a matter within the discretion of the presiding judge. *Carroll* v. *Boston Elevated Railway*, 527.

7. In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car of the defendant in which the plaintiff was a passenger, alleged to have been due to a broken and defective switch, the defendant, without objection or exception on the part of the plaintiff, put a hypothetical question to an expert asking for his opinion as to the causes by which the car might have been derailed, the defendant previously having laid a proper foundation upon which to rest the assumption of facts in the question. The witness assumed in his answer, in accordance with the assumption in the question, that the car track and the switch at which the car partially left the track were apparently in good condition as well after as before the accident, and then pro-

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Evidence (*continued*).]

ceeded to give his opinion that, if these conditions were found to have existed at the time, the tongue of the switch might have been moved a little when the forward trucks passed over, and that, if this occurred, the rear trucks as they followed might be caught, causing the car partially to leave the track. In further explanation of the way in which such an accident might happen, he stated that, if dirt had worked into the switch, the tongue might have been pushed out from the rail on which the car was travelling, causing it to run off the track, or, if the switch tongue had become slightly worn, that it would be a little low, causing the tread of the wheel to lift from the rail as it passed over. The plaintiff asked the judge to exclude the answer on the ground that it assumed the existence of facts not in evidence which the jury fairly could not find to have been true. The judge refused to exclude the answer. *Held*, that the refusal was right; that the possibilities testified to by the expert might be regarded either as additional reasons for his opinion derived from experience or as other possible consistent explanations of the cause of the accident falling within the scope of the inquiry. *Carroll* v. *Boston Elevated Railway*, 527.

8. One, who had been called to testify as a medical expert on behalf of the defendant at the trial of an action of tort for personal injuries, after having stated that he had examined the plaintiff just before the trial and had found that he was suffering from a marked case of nervous prostration, and that such a condition was a very unusual one after an accident, was asked by the defendant's counsel "What do you base your opinion on?" and replied, "In a long series of investigations made by me . . . I found that, outside of cases where there was litigation, accident produced nervous prostration in only about one half of one per cent." On motion of the plaintiff, that portion of the answer relating to litigation was struck out, and the defendant excepted. *Held*, that the exception must be overruled, since the witness could not, under the guise of reasons for his opinion, indirectly testify that the nervous prostration from which the plaintiff was suffering was due to his being the plaintiff in litigation seeking recovery for his injuries. *Lockwood* v. *Boston Elevated Railway*, 537.

9. In an action by a longshoreman against a stevedore by whom he was employed for personal injuries, caused by the falling of a staging when being lowered from the side of a ship, upon which it had been hoisted into place five hours earlier, by reason of the breaking of one of the rope slings by which it was suspended while being lowered, where the plaintiff contends that the rope when in proper condition was of ample strength to have sustained the load, and that it was weakened so as to be made unsafe by being chafed between the side of the ship and the staging by the oscillation of the ship as she rose and fell with the tide, the weakening effect upon the rope of the chafing caused by the movement of the ship and also the fact that a physical examination of the rope would have shown the wear caused by its former use are matters of common knowledge on which the opinion of experts is not admissible, but the opinion of experts is competent to show what strain or load a rope of the diameter of that which broke would carry ordinarily when in good condition. *Doherty* v. *Booth*, 522.

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10. At the trial, on an appeal from a decree of the Probate Court disallowing a will, of the issue whether or not the alleged testator was of sound mind, the following statements by a witness were admitted in evidence: that, at a time not too remote from the time of the executing of the alleged will, the testator "seemed to want to" superintend some work, "but could not concentrate his thoughts"; that the testator's habits in the use of liquor (such use and the excessive use of cigarettes being alleged to have caused general paresis resulting in mental unsoundness) never changed "but seemed rather to have a fuller mastery"; that on a certain occasion the testator committed "the deliberate act of scaring horses driven by" the witness, resulting in an arm and some of the ribs of the witness being broken, and, although the testator was present at the scene which followed, "it was not until the following day that he came to say that he had just heard of the accident." The statements were objected to as including expressions of opinion. *Held*, that the statements fairly came within the rule that a witness may state the results of his observation, even though that does in some measure involve his opinion or judgment as to matters which cannot be exactly reproduced or described to the jury precisely as they appeared to the witness. *Jenkins* v. *Weston*, 488.

Whether certain matters were proper subject upon which to allow testimony of expert or were matters in which such testimony would not assist jury is matter within discretion of presiding judge, see NEGLIGENCE, 45.

Testimony of certain witness held admissible as that of expert at trial of petition for damages due to obstruction or taking of private way in abolition of grade crossing of railroad, see DAMAGES, 6.

Extrinsic affecting Writings.

11. By the terms of a contract in writing the party of the second part agreed to pay to the party of the first part $25,000, and seven individuals as parties of the third part agreed to "jointly guaranty the payment of said $25,000, or any part thereof, *pro rata*." After the signing but before the delivery of the contract by F., one of the guarantors, he inquired of the party of the first part as to his liability thereunder, and the party of the first part wrote him a letter stating that he, the party of the first part, had submitted the paper to and had been informed by his attorney that the contract "was a limited one, and not a joint and several agreement, that is to say, each one of the guarantors is liable only for one seventh of the total amount. . . . I therefore advise you that said . . . contract is a *pro rata* one, and that you . . . are only liable for one seventh of the amount underwritten." The party of the second part failed to perform the contract, and the party of the first part duly assigned his interest to one who brought an action for one seventh of $25,000 against F. alone. F. demurred. *Held*, that the letter of the party of the first part to F. did not purport to and did not make a change in the contract nor in any way affect the legal rights of any of the parties, it being merely an expression of opinion on the part of the party of the first part, and it not appearing

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Evidence (continued).

that the party of the second part and the other six guarantors had any knowledge of it. *Wood* v. *Farmer*, 209.

Application of rule that oral agreement, purporting to control meaning and legal effect of contract in writing afterward made between same parties, cannot be enforced to affect latter, applied to such oral contract set up in defense to action on contract in writing, see CONTRACT, 1, 2.

Defendant in action for purchase price of goods, alleged by plaintiff to have been sold upon written order of defendant containing various terms, can offer to show, as part of evidence of fraud of plaintiff's agent in procuring his signature to order, that different agreement than that stated in written order was made between him and plaintiff's agent by word of mouth, see CONTRACT, 11.

Proof of Foreign Law.

12. At a trial, in which the question what the law of England is on a certain subject is an issue, an opinion of this court at an earlier stage of the same case, dealing with the law of England as proved at a former trial of the case, is not admissible in evidence to show what the law of England is. *Electric Welding Co.* v. *Prince*, 386.

Action to enforce liability of stockholders in foreign corporation, in which, as bearing on law of corporation's domicil, testimony of expert as well as printed law reports was introduced in evidence, see PRACTICE, CIVIL, 4.

Introduced without Objection.

13. Evidence, which is introduced at a trial without objection, and which, if it had been objected to, would have been excluded as incompetent, is entitled to its probative force. *Hubbard* v. *Allyn*, 166.

Uncontradicted not Conclusive.

14. A jury are not bound to believe testimony because it is uncontradicted. *Lewis* v. *Coupe*, 182.

15. A request of the defendant at the trial of an action of tort by an employee against his employer under R. L. c. 106, § 71, for a ruling that, since there was uncontradicted evidence introduced by the defendant that the injury to the plaintiff resulted from the act of a fellow servant, he could not recover, should not be given since the jury might disbelieve such testimony. *Ryan* v. *Fall River Iron Works Co.* 188.

Where, at trial of action for personal injuries resulting from negligence of defendant, defendant admits negligence and there is evidence of damage to plaintiff resulting therefrom, verdict nevertheless should not be ordered for plaintiff, since jury might not believe evidence as to damage, see NEGLIGENCE, 53.

Refreshing Recollection.

Official registrars at recount of vote may testify, refreshing recollections from tally sheets kept by them, at trial of election officer charged with wilfully making false count and report of votes, production of original ballots not being necessary, see FALSE COUNTING AND REPORTING OF VOTES, 3.

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Of Reputation.

Scope of examination of witnesses called to testify to reputation for truth and veracity of previous witness, see WITNESS, 2.

Relevancy and Materiality.

Physician, testifying as expert for defendant in action for personal injuries cannot give irrelevant and incompetent testimony under guise of reasons for his opinions, see *ante*, 8.

Evidence held irrelevant on issue whether, when plaintiff in action for personal injuries was injured, he was employed by defendant or by third party, see AGENCY, 5.

Evidence held relevant to show repudiation by defendant of what he deemed bad bargain for purchase by him of pig iron from plaintiff, see CONTRACT, 18.

Testimony of bystanders at counting of votes of election held under circumstances relevant evidence at trial of election officer charged with wilfully making false counting and reporting of votes, see FALSE COUNTING AND REPORTING OF VOTES, 2.

Evidence that superintendent of stevedore made no examination of rope before directing its use in supporting staging held to have been admissible in action by employee to recover for injuries due to fall of staging alleged to have been caused by rope's being defective, see NEGLIGENCE, 12.

EXECUTOR AND ADMINISTRATOR.

1. *Whether* a payment, made by one of two executors against the objection of his co-executor upon a promissory note which in the lifetime of the testator had become barred by the general statute of limitations, R. L. c. 202, §§ 1, 2, would remove the bar of the statute, here was left an open question. *Haskell* v. *Manson*, 599.

2. The plaintiff in a suit in equity was the administratrix of the estate of the payee of a non-negotiable promissory note, and she and her daughter and one who had no other interest in the estate of the maker except as executor were the executors of the will of the maker of the note, and all of them were defendants. The suit was to enforce payment of the note. The plaintiff alone would benefit by such payment. It appeared that, before the death of the maker of the note, action upon it had become barred by the general statute of limitations, R. L. c. 202, § 2. The third executor for that reason refused to allow payment of the note and thereupon the plaintiff and her daughter, the other two executors, paid $1 to the plaintiff as administratrix of the payee and joined in a written acknowledgment of the existence of the debt evidenced by the note. *Held*, that, the third executor objecting, the payment by the other two made for the purpose of benefiting one of them, the plaintiff, personally could not operate to bind the estate represented by the defendants to its detriment by removing the bar of the statute of limitations. *Ibid.*

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Where executor or administrator, under R. L. c. 150, § 23, deposits unclaimed funds in bank under order of Probate Court, bank's contract is made with judge of probate, to whom communications and notices of bank in regard thereto should be sent, see PROBATE COURT, 4; AGENCY, 1; EVIDENCE, 1; ESTOPPEL.

FALSE COUNTING AND REPORTING OF VOTES.

1. At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and knowingly making a false report of the result of the canvass and count of votes, the official tally sheets kept by the defendant in the counting of the votes are competent and are the best evidence to show what the count kept by the defendant was. *Commonwealth* v. *Edgerton*, 318.
2. At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and knowingly making a false report of the result of the canvass and count of votes, the testimony of bystanders, who observed the defendant's conduct in keeping a false tally of the votes, is admissible to show the facts which they observed although they were not election officers and were interested in the election only as citizens. *Ibid.*
3. At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes in an election and knowingly making a false report of the result of the canvass and count of votes, the Commonwealth, against the objection of the defendant, introduced the testimony of the registrars of voters to show that upon a recount by them it appeared that the ballots had not been counted and reported correctly, and the jury were allowed to inspect the sheets used by the registrars at the recount and used by them in testifying to refresh their recollections, the jury being instructed that those sheets were not evidence and could not be considered by them. The defendant contended that instead of this testimony the ballots themselves, being the best evidence, should have been produced for the jury to count. *Held*, that, assuming that the production of the ballots could have been compelled, which was doubted, there being no question raised as to any irregularities appearing on the face of the ballots, the number of the ballots cast on one side and the other was a matter of computation, and that the computation could be testified to by any one who made it, and therefore, that the registrars, refreshing their recollections by referring to the sheets used by them at the recount, properly could testify as to the result of the recount so far as it related to the count and report made by the defendant, and that the jury properly were allowed to inspect the sheets for the purpose of assisting them in passing upon the credibility of the registrars. *Ibid.*

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4. At the trial of an indictment under St. 1907, c. 560, § 410, against an election officer for wilfully performing contrary to law the duties imposed upon him by § 270 of the same chapter in making a false count of votes upon the question of the granting of licenses for the sale of intoxicating liquors in a city and in knowingly making a false report of the result of the canvass, there was evidence that the defendant made marks on a tally sheet as another election officer called off the answers on the ballots, for the purpose of keeping an account of the votes, that in doing so he marked twenty-one more votes for license, fifteen less votes against license and six less blanks than the other election officer called off to him and than afterwards appeared to be the true numbers upon a recount by the registrars of voters, and also that, when the defendant became aware that two bystanders were following the count, he kept the tally correctly. There was other evidence from which guilty knowledge on the part of the defendant could have been inferred. It further appeared that the defendant and the election officer who called off the answers to him signed the tally sheets thus marked by the defendant, and that these tally sheets were delivered to and received by those charged with the duty of declaring the results of the election as the reports of the results of the votes counted and canvassed by the defendant and the other election officer who signed them. *Held*, that there was evidence for the jury that the defendant wilfully made a false count and knowingly made a false report of the canvass of votes, that the count and canvass by the defendant and the election officer who called off the answers were none the less a count and canvass by the defendant because he merely marked the tally sheets while the other handled the ballots, and that the tally sheets signed by the two constituted and were intended to constitute reports of the results of the votes counted by them. *Commonwealth* v. *Edgerton*, 318.

FIRE.

Insurance against loss by fire, see INSURANCE, 1, 5, 6.

FITCHBURG.

Power of Legislature to control city of Fitchburg in administration of Burbank Hospital by prescribing who shall be officers and agents for that purpose, see CHARITY, 4.

FRAUD.

In action for damages resulting to plaintiff through deceit and fraud of defendant in selling to plaintiff as first mortgages mortgages that were second and third, representation that they were first was held not to be mere seller's talk, see DECEIT, 1, 2.

Demurrer to bill in equity to compel reconveyance of land obtained by defendant by fraud held rightly to have been sustained because on allegations of bill remedy was barred by laches, because of lack of necessary parties, and because of lack of offer by plaintiff to pay defendant what he paid for land, see EQUITY JURISDICTION, 9.

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Fraud (*continued*).

Specific performance of contract properly refused because of inequitable conduct of plaintiff, although contract was made by defendant and was not procured by plaintiff by use of such fraud or misrepresentation as would give defendant right to avoid it, see EQUITY JURISDICTION, 4.

Action for purchase price of certain goods alleged to have been sold by plaintiff to defendant in which defense was that written order therefor was procured from defendant and sale made to him by means of fraud of plaintiff's agent, see CONTRACT, 11–14.

Petition for revocation of decree allowing will on alleged ground that when will was executed testator was of unsound mind and that executor who presented will for probate and procured its allowance knew that fact, held properly to have been dismissed by single justice on facts found by him, on appeal from Probate Court, see PROBATE COURT, 2, 3.

Bill in equity against life insurance company for accounting as to amount due to plaintiff under terms of tontine life insurance policy, in which plaintiff alleged that company had fraudulently misused its property and diminished tontine fund, see EQUITY JURISDICTION, 1–3.

Payment by one of executors of will of deceased person, made on note due from estate, against objection of another executor, intended to remove bar of statute of limitations, was not allowed to do so in suit in equity to enforce note, because it appeared that person who was benefited by such removal was executor who made payment, see EXECUTOR AND ADMINISTRATOR, 1, 2.

Finding for defendant in action for conversion of glue which plaintiff contended defendant through his agent, glue broker, had procured from plaintiff by fraud, held to have been warranted because on evidence judge might have found that broker was agent of plaintiff and, acting within scope of his authority, conveyed glue to defendant, see CONVERSION, 2.

FRAUDS, STATUTE OF.

Oral agreement made by landlord after tenancy had begun, to keep steps on premises in repair is not invalid as violation of statute of frauds, see LANDLORD AND TENANT, 1.

Memoranda as to sale of real estate which were held insufficient because real estate was not sufficiently described, see EQUITY JURISDICTION, 7.

Contract providing for purchase by one party from the other of shares of capital stock in corporation to be organized, and for guaranteeing by other parties to contract of payment of purchase price is not violation of R. L. c. 74, § 7, see CONTRACT, 14.

GRADE CROSSING ACTS.

Suit under grade crossing act, St. 1890, c. 428, for damages due to obstruction or taking of private way, see DAMAGES, 5, 6.

Specifications in report of commissioners as to certain street held not to amount to discontinuance of portion of street lying outside of lines described therein, see WAY, 2.

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GUARANTY.

Contract between parties of first and second parts, and parties of third part who were "designated as guarantors," which was construed to be a joint guaranty by parties of third part, see CONTRACT, 4.

HAVERHILL.

1. St. 1908, c. 574, amending the charter of the city of Haverhill, is constitutional. *Graham* v. *Roberts*, 152.
2. St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional because of its provision that it should not take effect until it was accepted by the voters of Haverhill. *Ibid.*
3. St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional by reason of its provisions for the so called initiative and referendum in regard to the adoption of ordinances. *Ibid.*
4. St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional or invalid because the officers elected thereunder are subject to removal by an election of the voters of the city called and held under the provisions of that act. *Ibid.*
5. St. 1908, c. 574, amending the charter of the city of Haverhill, is not unconstitutional or invalid because it restricts the printed names on the official ballot for the mayor, the aldermen and the members of the school committee of that city to the two highest candidates for each office as determined by a preliminary election for nominations, nor because it denies the right to have printed on the ballot the name of a candidate nominated by a caucus of a political party, nor because it denies the right to have printed on the ballot the name of a candidate nominated independently, nor because it denies the right to have printed on the ballot a specification of a candidate's party or of the political principles which he represents, nor because it requires a candidate to sign and swear to a request that his name be printed as such candidate on the official ballot to be used at the preliminary election for nominations and to file a petition of qualified voters in which they certify that he is of good moral character and qualified to perform the duties of the office. *Ibid.*

HIGHWAY.

See WAY, 1-4; MOVING OF BUILDINGS, 1, 2.

HUSBAND AND WIFE.

Where the legal title to land is held by a husband in trust for others, it does not descend to his wife as one of his statutory heirs. *Crandall* v. *Ahern*, 77.

Constitutionality of St. 1908, c. 605, § 7, providing, among other things, that no assignment of or order for wages to be earned in future, to secure loan of less than $200, shall be valid against employer of assignor unless, when

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made by husband, written assent of wife is attached thereto, see CONSTITUTIONAL LAW, 1, 3, 4, 7.

Marriage of maker to payee of valid promissory note after its execution and delivery does not render note void, see BILLS AND NOTES, 1.

INFANT.

Mere relation of parent and child held not to cause negligence of son twenty years of age in driving carriage owned by him to be imputed to his mother who was in carriage with him, see NEGLIGENCE, 2.

INSURANCE.

Parol Contract for.

1. An action of contract, to recover from a fire insurance company the amount of damage by fire to certain stock and fixtures alleged to have been insured by the defendant, was heard upon an agreed statement of facts which contained no stipulation that the trial court might draw inferences of fact from the facts agreed upon. The right of the plaintiff to maintain the action if any agreement for insurance was made by the defendant was not disputed. The agreed facts were that the owner of the stock and fixtures went on December 15 to one who was admitted to be an authorized agent of the defendant, but who also was agent for several other insurance companies, and requested the issuance of policies of insurance upon certain identified property to the amount of $3,000, the policies to be in the Massachusetts standard form and to be delivered by the agent at a later date. Nothing was said as to the companies by which the policies were to be written, as to the amount of insurance to be assumed by each company, as to the premium to be paid, the term for which the policies were to run, or as to how the insurance was to be apportioned between the stock and fixtures. The agent wrote all the policies bearing date December 15 in four different companies, of which the defendant was one. Later, and before December 25, he decided that the companies which he represented should not assume the entire insurance and therefore got an agent for other companies to procure insurance for $2,000. No details of his acts were communicated to the owner, nor were the policies delivered to the owner before the fire, which occurred on December 25. *Held*, that the relations between the owner and the agent rested in negotiation and had not reached the finality of a contract. *Cunningham* v. *Connecticut Fire Ins. Co.* 333.

Life.

2. The requirement of R. L. c. 118, § 73, that every policy of life insurance which contains a reference to the application of the insured must have attached to it a correct copy of the application, is complied with by attaching to the policy a copy of the application for insurance without including a copy of a proposal for insurance printed and written on the back of the same paper or a "Memorandum for the solicitor to fill" printed above

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the application for insurance on the same side of the paper consisting of the questions "Amount of insurance now in force in this company?" and "Amount now applied for?" *Bonville* v. *John Hancock Mutual Life Ins. Co.* 197.

3. Whether, when a life insurance company makes an apportionment at the end of the tontine dividend period to the holder of a policy containing a provision that at the end of such period of the policy the insured shall have the option "to withdraw in cash this policy's entire share of the assets, i. e. the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to the policy, or to use his share wholly or in part in payment for further insurance, such apportionment is *prima facie* correct and not to be overthrown without evidence of fraudulent conduct on the company's part affecting the result, or at least of some error in the manner of making the apportionment or in the principles upon which it was based, was not decided in this case, which came before the court on demurrer to a bill in equity by a policy holder seeking an accounting from the insurance company, since the bill contained allegations, sufficiently specific, of fraudulent conduct on the part of the company in the management of its funds. *Peters* v. *Equitable Life Assurance Society*, 579.

4. The insured under a policy of life insurance, on which a premium of $125.25 was payable annually in advance, at the time when one of the premiums became due, instead of paying it, made a cash payment of $31.25 and gave a note for the balance of $94, payable in six months. The note stated that it was accepted by the insurance company at the request of the maker, together with $31.25 in cash, upon an express agreement there set forth, "that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made." The insured failed to pay the note at maturity, and thereafter died without having paid it. *Held*, that the assured was bound by the agreement contained in the note which he had signed and that accordingly the policy had become void on non-payment of the note at maturity. *White* v. *New York Life Ins. Co.* 510.

Bill in equity against life insurance company for accounting as to amount due to plaintiff under terms of tontine life insurance policy, in which plaintiff alleged that company had fraudulently misused its property and diminished tontine fund, see EQUITY JURISDICTION, 1–3.

Fire.

5. If in an action on a policy of insurance against fire there is evidence that the plaintiff, on the day after a fire had destroyed the insured prop-

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erty but before he had learned of it, stated to an agent of the defendant that the policy had been cancelled and that no liability attached to the company, a judge, before whom the case is tried without a jury, is warranted in finding that the plaintiff had assented to the cancellation of the policy before the loss occurred. *Smith* v. *Scottish Union & National Ins. Co.* 50.

6. In an action on a policy of insurance against fire in the Massachusetts standard form, upon the question whether a statement in writing signed and sworn to by the insured was forthwith rendered to the company as required by the terms of the policy, there was evidence that the insured property was destroyed by fire in the night, that on the afternoon of the next day the plaintiff learned of the fire, that thirteen days later he delivered a sworn statement to the insurance broker through whom he had procured the insurance, supposing that he was authorized to receive it, that the broker returned the statement to the plaintiff on the ground that he had no right to receive it, that a new statement was signed and sworn to and was furnished to the company twenty-one or twenty-six days after the night of the fire, that the plaintiff was the holder of the legal title of the property insured but held it for the benefit of a national bank of which he had been the cashier and of which he was the official liquidator under winding up proceedings, that the title had been acquired by the foreclosure of a mortgage, that it was understood between the plaintiff and the mortgagor that the mortgagor was to have the balance of the proceeds of the property after his debt to the bank had been paid in full, that the insurance was upon the building and its contents, which included the furniture and fixtures of a summer hotel of considerable size, that the plaintiff was occupied every day with his duties as liquidator and knew nothing about the building or its contents and accordingly left to the mortgagor the preparation of the statement, that immediately after the fire the mortgagor was sick and was confined to his house under a physician's care for a number of days, and that the plaintiff also was delayed somewhat in getting from the architect the specifications of the building. It did not appear how long the insurance broker retained the statement after it was delivered to him before returning it to the plaintiff, but an inference might have been drawn that he did not return it without first conferring with the defendant. *Held*, that a judge, before whom the case was tried without a jury, was warranted in finding that the plaintiff used due diligence in complying with the requirement of the policy that the sworn statement should be "forthwith rendered to the company." *Ibid.*

Facts held not to show making of oral contract for insurance against fire, see *ante*, 1.

Authority of Soliciting Agents.

Action against insurance company for slanders alleged to have been published concerning plaintiff by soliciting agents of defendant held not to be maintainable because of lack of evidence that acts of agents were within scope of their authority, see AGENCY, 7.

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Statutory Requirements as to Policy.

Compliance with requirements of R. L. c. 118, § 73, with regard to annexation of copy of application where policy contains reference to application, see *ante*, 2.

INTERROGATORIES.

See PRACTICE, CIVIL, 8.

INVITED PERSON.

See NEGLIGENCE, 68, 70, 71.

JOINT TORTFEASOR.

Selectmen and water commissioners of town held to be liable as joint tortfeasors for acts of trespass in private way in constructing street and digging trench for water main therein after town had attempted to lay out way as public street by vote which was illegal and void, see TRESPASS, 2.

JUDGMENT.

Entry of.

Judge of Superior Court may order that judgment in case there pending be entered in accordance with rescript from Supreme Judicial Court although application for rehearing of case by Supreme Judicial Court has been made and receipt of application has been acknowledged, if the rescript has not been recalled, see PRACTICE, CIVIL, 22, 23.

In Replevin.

Proper entry of judgment in action of replevin in one count to recover five articles where judge finds plaintiff entitled to four articles only, see REPLEVIN, 1, 3.

Petition to vacate.

At the hearing of a petition to vacate a judgment which was entered in a writ of entry against the petitioner and others, tenants therein, in favor of the respondent, the demandant therein, except for the interest of one S., who also was a tenant in the suit, it appeared that there was evidence tending to show that the petitioner and all the other tenants excepting S. had executed and delivered to the respondent, the demandant in the writ of entry, a deed of all their interest in the demanded premises, that such deed vested in the respondent a three fourths undivided interest in the premises and left in S. a one fourth undivided interest, and that the petitioner was defaulted in the writ of entry. The judge, before whom the petition to vacate the judgment was heard, dismissed it, and the petitioner excepted. *Held*, that the exception must be overruled since the judge

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might have found that the petitioner had no interest in the real estate or in the subject matter of the action. *Gordon* v. *Gordon*, 216.

JURISDICTION.

Superior Court has no power, after civil action has been entered therein on appeal from District Court whose jurisdiction does not extend to actions with *ad damnum* exceeding $1,000, to allow amendment to writ increasing *ad damnum* from $1,000 to $2,000, see SUPERIOR COURT, 1.

JURY AND JURORS.

Denial of motion for new trial of criminal case based on affidavits as to jurors not being together at all meal times, held to be warranted, see PRACTICE, CRIMINAL, 2.

LABOR UNION.

Members of labor union, who are engaged in lawful strike, may be enjoined, in suit in equity by building contractor, from causing those of plaintiff's employees who are members of union to leave his employ by threatening to impose fines under by-law of union, see UNLAWFUL INTERFERENCE.

LACHES.

See EQUITY JURISDICTION, 9.

LANDLORD AND TENANT.

Existence of Relation.

1. In an action by a married woman against the owner of a house let by him to the plaintiff's husband for personal injuries to the plaintiff caused by a defect in the steps leading to the house, it appeared that the principal conversation which resulted in the letting of the premises to the plaintiff's husband occurred on the Lord's day, that the defendant then promised the plaintiff and her husband that he would have the steps looked over and put in good repair, and would keep them so while they lived there, that the plaintiff's husband moved into the house in the following week, that, on the next day after the plaintiff went into the house to stay, the defendant came there and the plaintiff said to him that she saw he had done nothing about the steps yet, whereupon the defendant replied that he was going immediately to give directions to his son to "come down and look right after them," and that soon after the accident the defendant put in new steps. The defendant testified that he told his son to "be particular to keep them [the steps] safe so that no accident would occur." *Held*, that, although the first conversation alone could not have been proved under the statute of frauds, because it was a contract for a sale of an interest in land, and it also was void as a contract, because it was in violation of the

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statute for the observance of the Lord's day, yet, at the time of the later conversation, there was no question of the statute of frauds, because the tenancy had been created, and, as the conversation between the defendant and the plaintiff after she went to the house to live referred to a former conversation and was not intelligible without knowing what the former conversation was, the fact that the previous conversation was on the Lord's day did not make it incompetent for the purpose of explaining the later conversation and showing its meaning, and that the jury might find that, in connection with entering into the relation of landlord and tenant on a week day, the parties adopted the contract which they previously had attempted to make, and that there was evidence for the jury that the defendant had agreed to keep the steps in a safe condition. *Miles* v. *Janvrin*, 514.

Landlord's Liability to Tenant.

2. In an action by a married woman against the owner of a house let by him to the plaintiff's husband, for personal injuries to the plaintiff caused by a defect in the steps leading to the house, if there is evidence upon which the jury can find that the defendant made a lawful contract with the plaintiff's husband to look after the condition of the steps and keep them safe, so that the plaintiff's husband and his family might use them confidently without the duty of examining them to see whether the wood was sound and strong, the case is for the jury and it is error to order a verdict for the defendant. *Miles* v. *Janvrin*, 514.

For other questions which arose at trial of above case, see *ante*, 1.

3. At the trial of an action of tort for personal injuries alleged to have been received by the plaintiff by reason of negligence of the defendant or his employees, it appeared that the defendant leased to the plaintiff certain premises for use as a factory and made a contract to furnish to him, for a fixed price during the working hours of the factory, power for the running of it from a building across the street, it being agreed that, if the power was used beyond such working hours, an extra charge should be made. The power so furnished was carried across the street by means of a rope drive, and thence communicated by the plaintiff without the use of tight and loose pulleys to a counter shaft and thence to a main shaft in the factory. There was evidence tending to show that the failure of the plaintiff to use tight and loose pulleys was not improper, that the mechanical arrangements for starting and stopping the rope drive were in the building across the street from the plaintiff's factory and entirely under the control of the defendant, that the working hours of the plaintiff's factory were over at 6 P. M., that on the afternoon of the plaintiff's injury the power had been turned off and the rope drive had ceased running, and that thereupon the plaintiff had begun to relace a belt which was out of repair on the counter shaft in a manner which the evidence tended to show was proper, when at 6.25 P. M. without warning the rope drive started up and the plaintiff was injured. There was no evidence to explain the starting of the rope drive. The presiding judge ordered a verdict for the defendant and reported the case. *Held*, that a verdict should not have been ordered

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for the defendant, since the jury might have found that the plaintiff was in the exercise of due care, that it was the duty of the defendant to exercise reasonable diligence not to start the rope drive without warning the plaintiff after it had been stopped at the close of the working hours, and, in the absence of any explanation from the defendant in whose exclusive control the starting and stopping apparatus was, that the starting of the rope drive was due to a failure on the part of the defendant to exercise such diligence. *Silvermann* v. *Carr*, 396.

LAW OF THE ROAD.

R. L. c. 54, § 2, which provides that the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of the way, applies to the driver of a team passing from behind an electric street car which has stopped to let off passengers. *McGourty* v. *De Marco*, 57.

Application of above principle to action against person who drove upon plaintiff from behind when he was alighting from right hand side of street car, see NEGLIGENCE, 60–63.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

1. While one properly may criticise, discuss and comment in writing in a reasonable way upon acts of another which are a matter of public interest and upon the consequences likely to follow from them, and may do so with severity and by the use of ridicule, sarcasm and invective, if the basis of such criticism, discussion or comment is not fact, but falsehood, the publication is a libel. *Hubbard* v. *Allyn*, 166.

2. The fact that a single statement of fact in an alleged libel is true does not relieve the person who publishes the libel from liability to the person injured by its publication, if such true statement is so interwoven with false statements as to produce the effect of a fabrication. *Ibid.*

3. Where, at the trial of an action of tort for libel in which the defense set up in the answer is that the alleged libellous publication was true and was made without malice, there is no evidence that certain material statements in the alleged libel and inferences that might be drawn therefrom were true, the presiding judge properly may refuse to rule on the question whether there was any evidence of personal ill-will toward the plaintiff on the part of the defendant. *Ibid.*

4. At the trial of an action of tort for libel brought by a baker in Westfield against a member of the board of health of that town, it appeared that the alleged libel was published by the defendant concerning the plaintiff in two local newspapers and related to the use by the plaintiff in his business of "so-called vanilla" containing wood alcohol, insinuated that the plaintiff paid $2.75 per gallon for it, stated that "he who buys at this price is either

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criminally stupid or deliberately dishonest. . . . A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character," and characterized the use of such so-called vanilla as a "flagrant violation of public confidence and physical welfare." It also appeared that, before the board of health investigated what the plaintiff was using for vanilla, two complaints had been made by them against him in the local court, one of which the court had dismissed before the publication of the alleged libel, and the other of which afterwards was dismissed; that both complaints were then the subject of newspaper discussion; that, just before the publication of the alleged libel, an agent of the board visited the plaintiff's bakery, which was on a main thoroughfare of the town, and carried therefrom under his arm across the street to the rooms of the board a keg containing the "so-called vanilla." *Held*, that there was evidence from which a jury might have found that the defendant, in publishing the alleged libel, was actuated by such a feeling of ill-will toward the plaintiff as would render him liable for the damages resulting from the publication even if the statements therein had been true. *Hubbard* v. *Allyn*, 166.

5. At the trial of an action of tort for libel brought by a baker in Westfield against a member of the board of health of that town, it appeared that the alleged libel called attention to "the recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries," stated that "a dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character," insinuated that such dealer bought his "so-called vanilla" for $2.75 per gallon, and stated that "he who buys at this price is either criminally stupid or deliberately dishonest." There also was evidence tending to show that previous to the publication of the libel the board of health had made two complaints in court against the plaintiff "with regard to the conduct of things in and about his bakery," one of which was dismissed by the court in which it was made before the publication of the alleged libel, and that the complaints were a subject of newspaper discussion at the time the alleged libel was published; that the plaintiff was the only baker in Westfield upon whose premises so-called vanilla containing wood alcohol had been found, that just before the publication of the alleged libel an agent of the board of health had gone to the plaintiff's bakery and carried the keg containing the so-called vanilla across a main street of the town to the rooms of the board of health. There also was evidence that former customers of the plaintiff, in withdrawing their trade, stated that they did so because they understood that he was referred to in the article. The presiding judge refused to rule that there was no evidence that the article was published concerning the plaintiff, and the defendant excepted. *Held*, that the exception must be overruled, since there was evidence that the descriptive language of the alleged libel indicated, under the circumstances, to others than the plaintiff and the defendant, that the plaintiff was referred to in the article. *Ibid.*

6. The answer in an action of tort for libel, brought by a baker in Westfield against a member of the board of health of that town, set up as a defense that the alleged libel was true, was published without malice and consisted

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of a fair comment on a matter of public interest. At the trial it appeared that the defendant caused to be published concerning the plaintiff the following: "The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance — the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless articles. Pure vanilla wholesales at about $12 a gallon. What can one expect for $2.75? He who buys at this price is either criminally stupid or deliberately dishonest. . . . The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whisky. A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character." There was no evidence that the plaintiff paid only $2.75 a gallon for the "extract in question," but he testified without contradiction that he paid $4 a gallon for it. There was adequate evidence of damage. The presiding judge refused to direct a verdict for the defendant, there was a verdict for the plaintiff and the defendant alleged an exception. *Held*, that a reasonable inference from the published article was that the defendant asserted that the plaintiff paid only $2.75 per gallon for the "vanilla in question," and, because he had purchased the vanilla at such price, was "either criminally stupid or deliberately dishonest"; that the jury well might have found that the plaintiff did not pay such a price for the vanilla and that consequently the article was neither a true nor a fair comment, and therefore that the exception must be overruled. *Hubbard* v. *Allyn*, 166.

7. The plaintiff in an action of tort brought by a baker against a member of a board of health to recover damages for the alleged publication of a libel charging the plaintiff with using in his business "so-called vanilla" containing wood alcohol, in order to prove the extent of his damages may introduce in evidence statements made by former customers in withdrawing their trade to the effect that they did so because of the statements in the libel. *Ibid.*

Action against insurance company for slanders alleged to have been published concerning plaintiff by agents of defendant held not to be maintainable because of lack of evidence of authority of agents, see AGENCY, 7.

LIMITATIONS, STATUTE OF.

Payment by one of executors of will of deceased person, made on note due from estate, against objection of another executor, intended to remove bar of statute of limitations, was not allowed to do so in suit in equity to enforce note, because it appeared that person benefited by such removal was executor who made payment, see EXECUTOR AND ADMINISTRATOR, 1, 2.

LIS PENDENS.

Pendency of action of contract for collection of debt does not prevent maintenance of petition to enforce mechanic's lien therefor at same time, see MECHANIC'S LIEN, 1.

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LORD'S DAY.

Conversation on Lord's day between prospective landlord and tenant, which was principal conversation which resulted in letting, is admissible in evidence to explain conversation held after tenancy began in which landlord agreed to make certain repairs, see LANDLORD AND TENANT, 1.

MALICIOUS INJURY TO TREES.

Indictment and trial of tree warden for wilfully, maliciously or wantonly injuring tree standing for useful purpose on land of another, see TREE WARDEN, 2–4.

MANDAMUS.

Writ of mandamus issued to compel board of health of Cambridge to grant license as undertaker to one to whom they had refused it solely for reason that he was not licensed as embalmer by board of registration in embalming, see BOARD OF HEALTH, 1, 2.

MARSHALLING.

See EQUITY JURISDICTION, 8.

MASTER AND SERVANT.

See AGENCY, 1–8; NEGLIGENCE, 3–46.

MECHANIC'S LIEN.

1. Although one, to whom there is due from the owner of real estate a debt of the kind described in R. L. c. 197, relating to mechanic's liens, can have but one satisfaction of the debt, under § 33 of that chapter he may maintain against such owner at the same time an action of contract for the debt and a petition to enforce the lien to secure its payment. *Morrison Co.* v. *Williams*, 406.
2. A building contract contained as successive paragraphs in one article a paragraph providing for the making by the contractor to the architect of monthly statements of the amount in value of labor and materials provided and used in the erection of the building, and for the issuing by the architect of certificates for the payment of a certain percentage of such amount or of so much thereof as the architect deemed best, a paragraph which read as follows: "Final settlement to be made forty days after the full completion of said building and its acceptance by the architect," and a paragraph which read: "Provided, however, that in each of said cases of payment, if required, the . . . [contractor] . . . shall present a certificate from the clerk of the office where liens are recorded, signed by said clerk, to the effect that the works and estate are, at the time said payments are due, free from all liens or claims chargeable to the said" contractor. The contractor filed a petition under R. L. c. 197, to enforce a

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lien for the final payment alleged to be due him under the contract. The respondent filed an "answer in abatement," setting forth the above provision of the contract, alleging that there were a number of liens filed against the property for claims chargeable to the contractor, petitions to enforce some of which were pending, and that the contractor had not presented the certificate as to liens called for by the contract, but containing no allegation that the certificate as to liens had been required by him. The petitioner demurred to the answer. *Held*, that the demurrer must be sustained, since the provision as to the certificate relating to liens did not have to do with the final payment, and since it did not appear that the owner had required the presentation of the certificate by the contractor. *Morrison Co.* v. *Williams*, 406.

3. Where, while labor is being performed and materials furnished under an entire contract in writing with one who owns certain land for the painting of the buildings thereon, such land being subject to a mortgage, and during the progress of the work the land is divided into four lots, three of which are released from the mortgage and conveyed to a third party and the mortgage is foreclosed upon the fourth, the contractor upon the completion of his contract may maintain under R. L. c. 197 a petition to enforce a lien for such labor and materials upon the three portions of the original lot upon which the mortgage was not foreclosed. *Davidson* v. *Stewart*, 393.

4. An entire contract for the furnishing of labor and materials for the painting of the buildings upon certain land was contained in a proposition in writing by the contractor to do the labor for $775, the owner furnishing the material, "or pay me for the material, Sixty, Ninety and One Hundred Twenty days notes. . . . The total amount of contract for stock and labor will be $1,125 as above." The landowner accepted the proposition as follows: "I accept your estimate, terms and figures, on condition you accept a time note for the three Hundred referred to." The contractor performed the labor and furnished the materials in accordance with the contract. The landowner paid him cash to a certain amount and gave him two notes of $100 each which were duly paid and a third note for $100 which was not paid and, after failure of the landowner to meet it, was returned to him by the contractor. *Held*, that the provision of the contract in relation to payment in part by notes did not deprive the contractor of his right to a lien on the real estate to secure the payment of the balance due to him under the contract. *Ibid.*

MILLS AND MILL PRIVILEGES.

Present condition of law in this Commonwealth with regard to mill privileges discussed, see WATER RIGHTS.

Question involving assessment of tax upon mill privileges existing in Massachusetts and applied to power in Rhode Island, see TAX, 4.

MINOR.

See INFANT.

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MORTGAGE.

Of Personal Property.

Where, in purchasing merchandise in bulk, purchaser paid off two mortgages on the goods and took assignment of one of the two, bill by creditor to set aside sale as violation of St. 1903, c. 415, was dismissed, see SALES OF MERCHANDISE IN BULK.

Of Real Estate.

Pledgee of mortgage of real estate may foreclose it for breach of condition, but, if he buys in property at foreclosure sale, he holds it as trustee for pledgor and subject to redemption by him, see PLEDGE.

Where mortgagee fraudulently alters mortgage deed after its delivery so that it includes other land than that conveyed, and then makes foreclosure sale of entire premises, remedy of mortgagor is by real action and not by bill in equity, see REAL ACTION.

MOVING OF BUILDINGS.

1. R. L. c. 52, § 13, providing that no person shall move a building in a way in a town without written permission from the selectmen or road commissioners, under R. L. c. 26, § 2, applies to cities as well as to towns. *Commonwealth* v. *Byard*, 175.
2. The removal through a street of a city of a building, which is five feet longer and about a foot and a half wider than the building described in the permit granted under R. L. c. 52, § 13, is unlawful. *Ibid.*

Application of above principles at trial of indictment of tree warden for wilfully, maliciously or wantonly injuring tree standing for useful purpose on land of another, in making passage for building being moved upon street, see TREE WARDEN, 2–4.

MUNICIPAL CORPORATIONS.

Charter.

Right and duty of General Court with regard to regulation and government of cities, see CONSTITUTIONAL LAW, 8.

Proper exercise thereof in St. 1908, c. 574, amending charter of Haverhill, see HAVERHILL, 1–5.

Laws applicable to Cities.

Under R. L. c. 26, § 2, providing that laws relative to towns shall apply to cities so far as consistent with the general or special laws relative thereto, the provision of R. L. c. 52, § 13, that no person shall move a building in a town without written permission from the selectmen or road commissioners, applies to cities as well as to towns. *Commonwealth* v. *Byard*, 175.

Officers and Agents.

Legislative power to control cities in administration of public charities by prescribing who shall be appointed officers and agents to administer the charity, where instrument creating trust does not provide for such matters, see CHARITY, 3, 4.

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Removal by mayor of Taunton of sewer commissioners for cause, see TAUNTON.

Tree warden has no right under R. L. c. 51, § 10, to cut down or cut off parts of trees standing on private land outside of lines of street, see TREE WARDEN, 1.

Indictment against tree warden for wilfully, maliciously or wantonly injuring tree standing for useful purpose on land of another, and rulings and instructions at trial thereof, see TREE WARDEN, 2–4.

Selectmen of town which had not accepted R. L. c. 48, §§ 58–61, held to have acted beyond their powers in granting certain petition which was construed to be petition for relocation of way, and not for its alteration only, see WAY, 3.

Acts of selectmen and water commissioners of town, in committing acts of trespass upon private way by attempting to construct street and dig trench for water main therein when attempted layout thereof as street by vote was illegal and void, do not make town liable, but such officers are liable individually as joint tortfeasors, see TRESPASS, 1, 2.

Administration of Public Charity.

Where instrument creating trust for public charity does not provide who shall be officers and agents to whom administration of trust shall be intrusted, Legislature has power to control cities in such administration by making provisions regarding such officers and agents, see CHARITY, 3.

Application of this principle to case of Burbank Hospital in Fitchburg, see CHARITY, 4.

Use of Streets.

Under R. L. c. 52, § 13, and R. L. c. 26, § 2, persons moving buildings in streets of cities must have permit from city authorities, see MOVING OF BUILDINGS, 1.

Liability for Defects in Highways.

Liability of municipality for injury due to defects in public ways, see WAY, 4.

NEGLIGENCE.

Due Care of Plaintiff.

1. It is not as matter of law want of due care on the part of the assistant superintendent of a factory while running an elevator to refuse to heed a suggestion as to how to run the elevator, made by an inferior who is not shown to have any knowledge as to elevators. *Herlihy* v. *Little* 284.

Of one operating defective buzz planer in factory, see *post*, 22.

Of inexperienced boy of nineteen operating circular saw in box factory in usual way, see *post*, 24.

Of lookout on engine in factory yard injured in collision, see *post*, 15.

Of boy in factory who was killed from falling down elevator well because gate was left open, see *post*, 8.

Of one who thrust his fingers between rollers of grinding mill, see *post*, 35.

Of carpenter in mill who stumbled upon protruding nail in floor covered with shavings, see *post*, 38.

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Of workman in mill crushed against post by doors opening in floor to permit freight elevator to come up, see *post*, 41.
Of workman in walking upon boards temporarily placed upon terra cotta floor of building in course of construction, see *post*, 42.
Of employee in factory building killed while repairing leak in roof of building near electric light wires, see NEGLIGENCE, 72.
Of machinist's helper injured while working at hoisting and setting heavy castings as directed to with others and, under direction of superintendent, employing improper method not known to him to be such, see *post*, 43.
Of cripple sixty years of age struck by street car as he was crossing street, see *post*, 64.
Of person employed by railroad company to carry mail to and from trains, who was run over by train passing through station, see *post*, 20.
Of one entering store which was open for business although repairs were in progress, see *post*, 70.
Of one falling into coal hole in sidewalk late on dark afternoon in January, see *post*, 73.
Lack of due care by one boarding street car while it is in motion does not preclude recovery for injury received by him after he has been accepted as passenger and caused in no way by his negligence, see *post*, 56.
Motorman of street car, who, in violation of rules of company, fails to lessen speed of car at entrance to bridge where there is sunken joint in rail, is not in exercise of due care, see *post*, 29.

Assumption of Risk.

By employee, see *post*, 14, 16, 22, 24, 37, 38, 41–43.

Licensee.

Persons using private way opening into public streets, from which owner has not excluded public but at entrances to which he has posted notices stating its character, are mere licensees and not invited persons, see *post*, 68.

Invited Person.

Persons using private way opening into public streets, from which owner has not excluded public but at entrances to which he has posted notices stating its character, are mere licensees and not invited persons, see *post*, 68.
Rights of person entering for purposes of trade store, which proprietor has kept open for business while repairs are going on, are those of invited person; action to recover for injuries received by such invited person, see *post*, 70, 71.

Imputed.

2. At the trial of an action by a woman for personal injuries alleged to have been received from being thrown from a buggy because of a collision with an electric street car, there was evidence tending to show that the buggy was being driven by the plaintiff's son, whose negligence contributed to cause the accident, that the son was twenty years old and owned the horse and buggy, that the plaintiff was with him at his invitation on a journey

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from her home to see a friend of his, and that she did not exert any control over the manner in which her son drove. It also appeared that, after the journey had begun, upon the plaintiff's discovering that she had left her glasses behind, the son drove back to get them for her. There was further evidence tending to show, and the jury in answer to a special question found, that the plaintiff did not rely solely on the care and diligence of her son in driving. The presiding judge refused to rule that the negligence of the son should be imputed to the plaintiff, and the defendant excepted. *Held*, that the exception must be overruled, since the mere existence of the relation of parent and child did not cause the negligence of the son to be imputed to the plaintiff as a matter of law, and that the jury had a right to find that no relation of principal and agent or of master and servant existed between the plaintiff and her son, but that she was merely his invited guest, not depending exclusively upon his care as a driver. *Peabody* v. *Haverhill, Georgetown & Danvers Street Railway*, 277.

Employer's Liability.

Notice.

Purpose, construction and sufficiency of notice under R. L. c. 106, § 75, see EMPLOYERS' LIABILITY ACT, 1–4.

Matters of pleading in action to enforce.

Amendments to writ and declaration, see PRACTICE, CIVIL, 2.

In action by employee against employer for injuries due to dangerous and defective conditions of surroundings in which or of machinery with which plaintiff was directed to work, no allegation of mental deficiency of plaintiff is necessary in declaration in order that plaintiff may rely on such fact, see PLEADING, CIVIL, 4.

Assumption of risk by employee.

By carpenter in mill of risk of stumbling on protruding nail in floor continuously covered with shavings, see *post*, 38.

Employee does not assume risk of injury due to improper method of work used under direction of superintendent by fellow employees, see *post*, 43.

Nor of injury resulting from improper way, adopted under direction of one acting as superintendent, of fastening rope and hook to coupling of engine on turntable for purpose of turning table, see *post*, 16.

No assumption of risk of injury caused by defect in pulley on buzz planer in factory which was not obvious and of which employee did not know, see *post*, 22.

By employee of contractor erecting high building with terra cotta floors, of risk of injury resulting to him from board on which workmen walked over floor becoming improperly placed with respect to hole in floor, see *post*, 42.

By sealer of freight cars in freight house of railroad company, of risk of having ladder struck from under him by switching engine on adjoining track, see *post*, 37.

Lookout on switching engine in factory yard held not to have assumed risk of injury due to negligence of superintendent in placing car on track, see *post*, 14.

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No assumption of risk as matter of law, by inexperienced boy of nineteen, of dangers attending defect in spreader behind circular saw in factory, see *post*, 24.

Where there were no signals giving warning of elevator's approach, employee in mill held not to have assumed risk of injury by being crushed against post by opening of doors in floor to permit freight elevator to come up, see *post*, 41.

Plaintiff mentally deficient.

In action by employee against employer for injuries due to dangerous and defective conditions of surroundings in which or of machinery with which plaintiff was directed to work, no allegation of mental deficiency of plaintiff is necessary in declaration in order that plaintiff may rely on such fact, see PLEADING, CIVIL, 4.

Fellow servant.

Action for personal injuries alleged to have been received by plaintiff while in brewery assisting employee of defendant whose negligence caused the injury, held not maintainable because on facts plaintiff was fellow servant of negligent employee, and not employee of third party, see AGENCY, 4, 5.

Ways, works or machinery.

3. If a boy about fifteen years of age, who is employed in a shoe factory and whose duty it is to carry racks of shoes to and from a workman on the third floor of the factory and to use the elevator of the building for that purpose, goes by the elevator to the third floor and, after speaking a word or two with a workman, is seen walking backward toward the elevator well drawing a rack of shoes after him, and, the elevator having risen in the meantime to the next story and the gate being up, he falls down the well and is killed, his administrator cannot recover damages for his death from the boy's employer under R. L. c. 106, as there is nothing to show that he was in the exercise of due care. Upon this issue it does not help the administrator to show that the gate of the elevator well had been repaired by nailing on an extra piece of wood, which made it heavier and caused it sometimes to stay up and sometimes to fall down of its own weight, if the gate was not connected automatically with the elevator and its position did not indicate where the elevator should be, and the boy knew this. *Taylor* v. *Hennessey*, 263.

Other actions for injuries to employees due to defective or dangerous machinery or appliances, see *post*, 21–36.

Superintendence.

4. It is not within the scope of the employment of the foreman of a teaming business to demonstrate in the stable to one of the employees the working of a gun which belonged to the foreman and which earlier in the day he had lent to the proprietor of the teaming business for him to use in shooting a cat which had been stealing pigeons from the stable, and if, while the foreman is so demonstrating the working of the gun, it goes

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off and injures another employee, the proprietor of the stable is not liable for the negligence of the foreman. *Smith* v. *Peach*, 504.

5. If an engine company makes a contract to deliver a stationary steam engine to a valve company and to supply a man to superintend the erection of the engine ready for steam connections, turning it over in running order, the valve company agreeing to pay the expenses of the man thus sent and to furnish "laboring help as needed," and if in pursuance of this contract the engine company sends a man who acts as its representative in superintending the setting up of the engine, a workman of the valve company, who is told by the general manager of the valve company to help the superintendent sent by the engine company and to obey his orders in whatever he wants done and thereupon proceeds with other men to work under the orders of such superintendent in setting up the engine, becomes while doing so the servant of the engine company, and that company owes him the duty of competent superintendence and is liable to him for injuries caused by its superintendent's negligence. *Bowie* v. *Coffin Valve Co.* 571.

6. Negligence on the part of the car despatcher of a street railway company in the performance of his duties is negligence of an employee of such company who is intrusted with and exercising superintendence under R. L. c. 106, § 71, cl. 2, and such company is liable to its other employees for personal injuries caused by such negligence. *Fitzgerald* v. *Worcester & Southbridge Street Railway*, 105.

7. At the trial of an action against a street railway company under R. L. c. 106, § 71, cl. 2, § 72, by the administrator of one alleged to have received injuries which resulted in his death in a collision between two electric street cars of the defendant, one of which the plaintiff's intestate was operating as motorman, there was evidence that the car which the plaintiff's intestate was operating was being run under and in accordance with special orders and not as one of the cars upon the defendant's regular schedule, and that the car which ran into it was running on the regular schedule; that it was a general custom of the defendant to notify both the conductor and the motorman of a regular car which was to wait for a special car, and also to post all orders for special cars which conflicted with the regular schedule on a certain bulletin board in the car barn; that, at a reception given to a retiring officer of the defendant the night before the accident, the plaintiff's intestate and the conductor in charge of his car received their orders as to the special car orally from the car despatcher of the defendant, and at the same time the conductor of the regular car which ran into theirs received oral notice not to start from the car barn until the car, which the plaintiff's intestate was running, had passed, but that the motorman of the regular car received no notice or order with regard to the special car, and that no notice was posted on the bulletin board. *Held*, that there was evidence warranting findings that the car despatcher was negligent in not giving to the motorman of the regular car, as well as to the conductor, orders to wait for the special car, and in not posting the order as to the special car on the bulletin board, and that such negligence was the cause of the collision. *Ibid.*

8. Evidence that a contractor's general superintendent directed K., a mason

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in the contractor's employ, to "take S. [another mason] and two helpers" and set a capping stone on a corner of the building, and departed, that K. said "Come on, S.," and that then they, with the aid of the two helpers, constructed a staging to use in setting the stone, that K. and S. received the same pay and that K. had no authority to hire or discharge employees, will not warrant a finding that K. was one "intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence," within the meaning of R. L. c. 106, § 71, cl. 2. *Stevens* v. *Strout*, 432.

9. The mere fact, that, by reason of his experience, one mason employed by a contractor in the erection of a building gave directions to another mason and two helpers working with him on a certain part of the work, does not constitute him one whose sole or principal duty was that of superintendence within the meaning of R. L. c. 106, § 71, cl. 2. *Ibid.*

10. A contractor is not liable, under R. L. c. 106, §§ 71, 72, for injury to an employee or death resulting therefrom, caused by the falling of a staging constructed in the course of their duties by the employee's fellow workmen, although it appears that one of such workmen, by reason of his experience, gave directions in the performance of that particular piece of work, the contractor and his superintendent being absent, and that the staging as constructed was neither safe nor suitable, it not appearing that the contractor failed to furnish proper materials for the purpose or that the sole or principal duty of the fellow workman who gave such directions was that of superintendence. *Ibid.*

11. The common law rule, that where a master has provided a sufficient supply of proper temporary appliances for the use of his servants he is not liable for an injury to one of his servants caused by the choice of a defective appliance by another of them, has no application to an action under R. L. c. 106, § 71, by a workman against his employer for injuries caused by the choice or use of a defective appliance by one intrusted with and exercising superintendence. *Doherty* v. *Booth*, 522.

12. In an action by a longshoreman against a stevedore by whom he was employed, for personal injuries caused by the falling of a staging which was being lowered from the side of a ship where it had been hoisted into position about five hours earlier, it appeared that the work of placing the staging in position on the ship and of removing it at the end of the day was done under the personal supervision of one who could have been found to have been acting as a superintendent of the defendant, that the falling of the staging was due to the breaking of one of the rope slings by which it was suspended while being lowered, that, after the staging had been hoisted into place five hours earlier, this rope was unhooked from the falls and was left hanging between the side of the ship and the staging in such a way that as the ship rose and fell with the tide the staging would move or chafe on the ship and the rope would be worn, and that the appearance of the rope immediately after the breaking was described as torn or unravelled with each strand longer than the other and as ragged and "kind of burned." It further appeared that the rope was an inch and a half thick, and when in proper condition was of ample strength to have sustained the load. Evidence was offered by the plaintiff to show that the

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superintendent made no examination of the rope before directing or permitting its use in lowering the staging. This evidence was excluded by the presiding judge, who ordered a verdict for the defendant. *Held*, that it was a question for the jury whether the defendant's superintendent by using reasonable care should have known from inspection that the sling either was unsuitable when first used or had become weakened by chafing to such an extent as to be unsafe, and that, if the superintendent should have had such knowledge, his failure to take proper precautions which might have averted the accident was evidence of negligence in superintendence for which the defendant would be liable. *Held, also*, that the evidence that the superintendent made no examination of the sling before directing or permitting its use was plainly admissible and its exclusion was erroneous. *Doherty* v. *Booth*, 522.

13. At the trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ and to have been caused by negligence on the part of a superintendent of the defendant, it appeared that the injury to the plaintiff was caused by the collision in the defendant's factory yard, which covered a large space and contained a network of tracks, of an engine, upon which the plaintiff was, with a car placed on the track by orders of one L., and there was evidence tending to show that L. and L. only gave orders to the other men in the yard, eight in number, that he got twenty-five cents a day more pay than they did, that occasionally, "when he did not have anything else to look after," he worked with his hands, and that he received directions from another person, not the defendant, written on pieces of paper, stating that certain designated material in the yard was to be moved to certain designated places in the factory. *Held*, that there was evidence which would warrant a finding that L. had entire charge and superintendence of the department of distribution of materials in the yard, and that superintendence was his principal duty, and therefore that he was a person for whose negligence causing injury to an employee the defendant would be liable under R. L. c. 106, § 71, cl. 2. *Mattson* v. *American Steel & Wire Co.* 360.

14. At the trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, it appeared that at the time of the alleged injury the plaintiff was employed as lookout on a narrow gauge switching engine in the yard, that the yard was extensive and contained a network of tracks, both narrow gauge and broad gauge, that the superintendent of the yard, under whom the plaintiff worked, sometimes directed that a car be moved by hand, but that, whenever he did so, he notified the engine crew; that the accident which caused the plaintiff's injury occurred at ten o'clock at night and was a collision between the engine upon which the plaintiff was and a car which by the superintendent's order had been moved by hand upon the track where the engine was working, but of which the superintendent had failed to notify the engine crew. *Held*, that there was evidence of negligence of the superintendent, and that the injury was not one of which the plaintiff had assumed the risk. *Ibid.*

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15. At a trial of an action of tort against a steel manufacturer to recover for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, it appeared that the plaintiff was injured while on the foot board of a narrow gauge switching engine in the yard of the defendant acting as a lookout, that the yard was extensive and contained a network of tracks, that the engine, on which the plaintiff was, came into collision with a car which had been put on the track by hand by order of a superintendent of the defendant who negligently had failed to inform the plaintiff of that fact, that a few minutes before the collision the plaintiff on the engine had been by the same point where the collision occurred and had observed that the car was not on the track where it was when the collision occurred, that the superintendent was accustomed to inform the engine crew when a car was moved in the yard by hand, and that the accident occurred at ten o'clock at night. *Held*, that the question, whether the plaintiff when injured was exercising as much care as he should have exercised under the circumstances, was for the jury. *Mattson* v. *American Steel & Wire Co.* 360.

16. At the trial of an action against a railroad company for personal injuries received by the plaintiff while in its employ, which were alleged to have been due to the negligence of one acting as a superintendent of the defendant, there was evidence tending to show that the plaintiff was employed as a common laborer about a roundhouse of the defendant, that at the time of the accident he was working under the direction of one who was taking the place of the usual superintendent, the latter being absent on account of illness, that under such direction the plaintiff and others attempted to move a turntable with a locomotive upon it, but were unable to do so, that thereupon the person acting as superintendent directed that a certain rope be procured, which was done, and, with the acting superintendent looking on, one end of the rope was attached to a locomotive not on the turntable, and an iron hook, which was ten or twelve inches long and about two inches in diameter and was fastened to the other end of the rope, was placed in a hole in the coupling attachment of the locomotive on the turntable, that then, under the direction of the acting superintendent, the engine not on the turntable was started and that thereupon the hook straightened out and, because of the tension of the rope, flew through the air and struck the plaintiff. It appeared that the plaintiff had assisted to move the turntable under similar circumstances on former occasions, but that never on such occasions had the rope been attached to either of the locomotives by merely placing the hook in a hole of the coupling attachment. *Held*, that there was evidence warranting the submission to the jury of the question whether or not the plaintiff's injury was caused by negligence of a person acting as superintendent of the defendant, and that the plaintiff did not, as matter of law, assume the risk of the injury. *Brosnan* v. *New York, New Haven, & Hartford Railroad*, 221.

Action to recover for injuries alleged to be due to negligence of superintendent of defendant in failing to use enough workmen or proper methods in steadying heavy casting being hoisted into place, see *post*, 43–45.

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It is not negligent for superintendent of contractor building ten story building with terra cotta floors to fail to make constant inspection to see that boards on which employees walk over floors are placed properly with regard to obvious holes in floor, see *post*, 42.

Negligence of person in charge of signal, switch or locomotive engine on railroad.

17. The means used for the transportation of passengers by the Boston Elevated Railway Company in the subway in Boston on February 13, 1905, did not constitute a "railroad" within the provisions of R. L. c. 106, § 71, cl. 3, and therefore an employee of that corporation, who on that day was injured by reason of the negligence of a person in the employ of the company and in charge and control of a signal used for the starting and stopping of trains at the Scollay Square station in the subway, could not recover under such clause of the statute. *McGilvery* v. *Boston Elevated Railway*, 551.

18. St. 1908, c. 420, which amended R. L. c. 106, § 71, cl. 3, by adding provisions as to elevated railways so that the wording of its provision imposing upon an employer a liability for an injury to an employee caused by "the negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad" was so changed as to make an employer liable for such an injury caused by "the negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, elevated train or train upon a railroad or elevated railway," is not declaratory of the law as it existed under the Revised Laws, but imposes upon elevated railway companies a burden to which they had not been subject under the Revised Laws. *Ibid.*

19. At the trial of an action against a railroad corporation for personal injuries received by the plaintiff while in the employ of the defendant and alleged to have been due to negligence of one in charge of a locomotive engine of the defendant, there was evidence tending to show that the locomotive engine in question was attached by a rope to another engine on a turntable in a yard of the defendant for the purpose of turning the table, that a superintendent of the defendant directed that the engine in question should be started forward and that the person in charge of it started it with a jerk, straightening out and loosening a hook which fastened the rope to the other engine, and that, because of the tension of the rope, the hook flew through the air and struck the plaintiff. *Held*, that there was evidence which would warrant the jury in finding that under the circumstances the person in charge of the engine was negligent in starting it with a jerk. *Brosnan* v. *New York, New Haven, & Hartford Railroad*, 221.

20. At the trial of an action under R. L. c. 106, § 71, cl. 3, § 73, against a railroad company by the widow of one who, while employed by the defendant, was struck and instantly killed by a train of the defendant, there was evidence tending to show that the plaintiff's husband had been employed by the defendant for four days and in the course of his duties had just placed

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mail upon a train at a station of the defendant and had nine minutes in which to go to a postoffice one hundred and fifty yards distant, procure mail for another train and return, that in going to the postoffice it was necessary for him to cross double tracks of the defendant over which trains going in both directions frequently passed, that the defendant maintained a gong near the station which was rung when a train, going in the direction opposite to that in which the train that the deceased had just left was going, approached the station, that the day was stormy with rain and sleet and, in crossing the tracks, the plaintiff's husband, pushing a handcart furnished him by the defendant, followed some passengers who had just left the train and walked with his head slightly bent forward, looking down and straight ahead, when, without any gong being rung or the bell or whistle upon the engine being sounded, a train, approaching at the rate of thirty miles an hour from the direction that the train which he had just left had gone, struck him and he was instantly killed. *Held*, that as a matter of law the plaintiff's husband was not in the exercise of due care in placing himself in a position of great danger without giving any attention to his surroundings. *Skinner* v. *Boston & Maine Railroad*, 422.

Dangerous or defective machinery or appliances.

21. While an employee, who in an action of tort is seeking recovery from his employer for an injury alleged to be due to such a defect in the ways, works or machinery used by the employer as the employer would be accountable for either under R. L. c. 106, § 71, cl. 1, or at common law, cannot maintain his action if the evidence at the trial of the action leaves it a matter of conjecture, whether the cause of the injury to the plaintiff was such a defect or was an improper adjustment of machinery due to carelessness of the plaintiff or of a fellow employee, nevertheless the plaintiff is not obliged to exclude all doubt as to the cause of the accident, but only to show by a fair preponderance of the evidence that its cause was such a defect as was alleged in his declaration. *Rowell* v. *Gifford*, 546.

22. At the trial of an action of tort for personal injuries, brought against the proprietor of a factory by one who was a skilled and experienced employee therein, the presiding judge ordered a verdict for the defendant at the close of the plaintiff's evidence, and the plaintiff alleged exceptions. There was evidence tending to show that the plaintiff's hand was cut off while he was operating a buzz planer, and that it was possible that the accident might have been caused by an improper adjustment of the apparatus by the plaintiff or a fellow employee. The jury would have been warranted in finding, however, that a preponderance of the evidence tended to show that the accident was caused by a loose pulley, which was attached to the cylinder of the planer and which caused the cylinder to jump and the plaintiff's hand thus to be thrown on to the knives of the cylinder, that it was not the plaintiff's duty to repair the pulley, and that he did not know of its defective condition. *Held*, that the plaintiff's exception must be sustained, since he had not as matter of law assumed the risk of the injury he received, because he did not know of the defect, and since there was evidence warranting a finding that when injured he was in

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the exercise of due care and that his injury was caused by the defective pulley, for which the defendant was accountable. *Royal* v. *Gifford*, 546.

23. In an action by a workman against his employer for personal injuries caused by a defect in a machine operated by the plaintiff, if the plaintiff testifies that he was operating the machine in the usual way when he was injured, this is evidence for the jury that he was in the exercise of due care. *Lynch* v. *Lynn Box Co.* 340.

24. If an inexperienced boy of nineteen, who is set at work in a box factory to cut pieces of wood for boxes upon a machine containing a circular saw revolving toward him, knows that a flat piece of metal, called a spreader, which is intended to enter the slit in the wood as the saw cuts it and prevent it from closing on the saw, owing to the screws that fasten it being loose, sometimes or "real often" fails to enter the slit and hits the wood, causing his hand to jump, it does not follow as matter of law that the boy appreciates and assumes the risk of his hand being thrown forward upon the saw when it is made to jump by a piece of wood hitting the spreader, and, in an action against his employer for injuries thus incurred, it is for the jury to say, taking all the circumstances into account, whether he appreciated the danger and assumed the risk. *Ibid.*

25. In an action for personal injuries caused by the breaking of a rope, if the plaintiff shows that the rope when in good condition was of ample strength to have sustained the load which was upon it at the time it broke, and nothing further appears in regard to the condition of the rope, the jury from their common experience can find that the accident would not have happened unless the rope in some way had become unsound. *Doherty* v. *Booth*, 522.

26. A stevedore is liable for personal injuries sustained by a longshoreman in his employ by reason of the falling of a staging, when it was being lowered from the side of a ship under the direction of his superintendent, owing to the breaking of one of the rope slings by which the staging was suspended, if the accident was caused either by the employer's furnishing a defective rope, or by a rope which was sound when furnished having become defective by age or wear under such circumstances that the employer by the exercise of reasonable diligence would have known its condition. *Ibid.*

27. If the proprietor of a teaming business, who has borrowed from his foreman a magazine gun loaded with more than one cartridge for the purpose of shooting a cat that had been stealing pigeons from his stable, leaves the gun in his office with a charge in it after he has used it, and the owner of the gun enters the office and takes the gun and, while he is demonstrating the gun's workings to a fellow employee, it goes off and injures another fellow employee, the injury to such employee cannot be said to have been caused by negligence on the part of the proprietor. *Smith* v. *Peach*, 504.

28. If the proprietor of an ice run orders a teamster who has been driving a pair of horses to change places with a man who is working on the run, and the change is made, or if without a direct order of the proprietor the change is made with the cognizance and approval of the proprietor's su-

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perintendent who has full authority to represent the proprietor in the matter, the proprietor is liable to the teamster who left his horses to work on the ice run if while so working he is injured by reason of the negligence of the proprietor in furnishing an unsafe chain as part of the machinery of the run. *Lewis* v. *Coupe*, 182.

29. A motorman operating a car on a track over which he passes many times every day, who, in violation of a rule of the corporation by which he is employed, fails to lessen the speed of his car when approaching at the entrance of a bridge a sunken joint in the tracks depressed about two inches, of which he has known for at least a month, knowing also that such a joint may send the car off the track and against the bridge, if he is injured in consequence of the car leaving the track and running against a post of the bridge, cannot recover from his employer for his injuries, as there is no evidence that he was in the exercise of reasonable care. *Lanen* v. *Haverhill, Georgetown & Danvers Street Railway*, 337.

30. At the trial of an action by the next of kin of one who, while in the employ of the defendant, had received injuries which resulted in his death without conscious suffering, it appeared that the injuries resulted from the fall of an elevator, upon which the employee was riding, which was caused by a defective condition due to the defendant's negligence. There was evidence that at the time of the accident there were thirteen persons in the elevator car, and that at some time previous to the accident there had been in the elevator a notice, signed by the defendant, that not more than ten persons at a time should ride thereon. There was evidence tending to show that no such notice was in the elevator at the time the employee boarded it, that there were not ten persons on board when she did so, and that the additional weight of three persons was not a contributing cause of the accident. *Held*, that a verdict for the plaintiff was warranted. *Herlihy* v. *Little*, 284.

31. At the trial of an action against an employer to recover for the death of an employee, it appeared that the death resulted from the fall of an elevator due to its defective condition, and that it was the duty of the employee to report to the defendant any defect in the elevator. At the time of the accident, the employee was running the elevator. The defendant requested the presiding judge to rule that, "if the elevator at the time of the accident was out of repair, the plaintiff could not recover." The request was refused. *Held*, that the request was refused properly, since it omitted the necessary element that in the exercise of reasonable prudence it would have been possible for the employee to have discovered the want of repair. *Ibid.*

32. At the trial of an action against an employer to recover for the death of an employee, it appeared that the death resulted from the fall of an elevator due to its defective condition, that it was the duty of the employee to notify the defendant of any defect which might arise in the elevator, and that the employee was running the elevator at the time of the accident. The defendant requested the presiding judge to rule that, if the employee knew the defective condition of the elevator at the time of the accident, the action could not be maintained, and the request was refused.

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Held, that the request was refused properly, since such knowledge on the part of the employee would not preclude recovery unless he also appreciated the risk of running the elevator under such conditions. *Herlihy* v. *Little*, 284.

33. At the trial of an action against a corporation operating a cotton mill by a woman, who, while employed in the weaving room, received injuries alleged to have been caused by the sudden and automatic starting of a loom due to its defective condition, it appeared that the loom, which was constructed so as to be started and stopped by the use of a shipper which shifted a belt from a loose to a tight pulley, and was intended to be started in that way only, never before had started automatically, but there was evidence tending to show that it had been in use many years, that its shaft had become so worn that, some time before the accident, a new one had been substituted, and that the adjustment of the new shaft to the old loom was made in a manner which might have been foreseen by one familiar with the mechanism to make it likely that the belt would work from the loose to the tight pulley automatically and start the loom. *Held*, that there was evidence from which the jury would be warranted in finding that the cause of the automatic starting of the loom was a defect therein such as, under R. L. c. 106, § 71, cl. 1, rendered the defendant liable for the consequences of the plaintiff's injury. *Ryan* v. *Fall River Iron Works Co.* 188.

34. At the trial of an action against a corporation operating a cotton mill by a woman, who, while employed in the weaving room, received injuries alleged to have been caused by the sudden and automatic starting of a loom due to its defective condition, it appeared that the loom, which was constructed to be started only by means of a shipper and should have remained at rest unless so started, never before had started automatically, but there was evidence tending to show that the loom was an old one and that some repairs had been made upon it within three months before the accident, and that the repairs were made in an improper way, so as to render automatic starting likely. The presiding judge in his charge to the jury stated: "If you are not satisfied as to what was the specific cause of the starting of the loom, but do find as a fact that it did start suddenly from a position of rest when it had been properly stopped, you may consider that fact as evidence to show that there was some defective condition in the loom and some negligence in connection with that defective condition, even though you cannot state specifically what the defective condition was." *Held*, following Byrne *v.* Boston Woven Hose Co. 191 Mass. 40, that the instruction was proper. *Ibid.*

35. At the trial of an action of tort for personal injuries by an employee against his employer, who owned and operated a mill, it appeared that the plaintiff was injured by having his fingers caught between the rollers of a roller mill, that he was fifty-eight years old, experienced in the work of grinding and had been employed by the defendant in his mill for three years, and that the only grinding mills used by the defendant for about six months before the accident were such as he was injured upon; that some time before the accident the mill upon which the plaintiff was in-

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jured had been rendered defective by reason of a belt having been made too short, and that the plaintiff had known of the defect but had been told by the head miller almost two months before the accident that the head miller "would have the belt man come as soon as" he "could get him and make that belt longer"; that when injured the plaintiff was reaching his fingers between the rollers of the mill to perform a duty which would have been proper if the mill had been at rest, that he had just seen the head miller raise a counter shaft to stop the mill and had proceeded on the assumption that the mill had stopped, as it would have done if the shortness of the belt had been remedied, but that, it not having stopped, his fingers were caught and he was injured. It also appeared that the plaintiff knew that he could have learned whether the mill had stopped if he had looked at some belts and pulleys which were near at hand and in plain view, but that he did not look, although he did not know whether the defective belt had been repaired and knew the danger of doing as he did if the mill still were running. *Held*, that the plaintiff was not in the exercise of due care. *Whitmore* v. *H. K. Webster Co.* 281.

86. At the trial of an action of tort against two partners, C. and S., for personal injuries received by the plaintiff while in the defendants' employ through the falling of a temporary staging alleged to have been caused by defective material from which it was made, it appeared that the work upon which the plaintiff was engaged when injured was the putting of new metal sheathing on the outside of a building. There was evidence tending to show that, in the construction of the stagings upon which the plaintiff worked, two blocks of a size two feet by three feet were used by being nailed to the building, and that there were no other blocks in use on the work; that the work reached a point where the staging which was being used was inadequate, and that, at about noon, the plaintiff and his fellow workman told the defendant C. that a swinging stage was necessary, that the defendant C. told the defendant S. to get such a stage for the workmen, that the defendants did not own such a stage, but that the defendant S. went with the plaintiff and his fellow workman to the building where the work was being done, to "see what we can do," and the plaintiff's fellow workman suggested a device which required that two blocks should be nailed to the building upon which should rest the ends of cross pieces which, in turn, should support a ladder for the plaintiff to work upon, that S. assented to the arrangement and departed, that the plaintiff and his fellow workman thereafter constructed the stage as planned, using both of the blocks above referred to, which already had been nailed and renailed to the building six times, and which on this occasion the plaintiff and his fellow workman nailed vertically to the building, so that the cross pieces supporting the ladder upon which they stood rested upon the ends of the blocks, and that, while they were standing on the staging at work about four hours later, it fell because one of the blocks split lengthwise. The presiding judge refused to direct a verdict for the defendants, and they excepted. *Held*, that the exception must be overruled, since it was the defendants' duty to furnish proper materials for the staging, and there was evidence which would warrant a finding that

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the defendants authorized the use of the block which broke, that the block was unsuitable and, if it had been properly inspected, would have been discovered to be so. *Dunleavy* v. *Sullivan*, 29.

Action by employee of stevedore against his employer for injuries resulting from breaking of rope sling supporting staging, see *ante*, 12; EVIDENCE, 9.

Action to recover for injuries alleged to be due to negligence of superintendent of defendant in failing to use proper methods in steadying heavy casting being hoisted into place, see *post*, 43–45.

Dangerous place in which to work.

37. One employed by a railroad corporation as a sealer of freight cars in a freight house, who in the ordinary course of his employment is standing on a ladder which rests on a narrow space between two railroad tracks, engaged in sealing the door of a car on one of the tracks, where a car cannot pass on the other track without hitting the ladder, and is thrown down and injured by reason of the ladder's being knocked from under him by a switching engine running in on the other track, cannot recover from his employer for his injuries thus caused, the risk of such an accident being an obvious one assumed by him by continuing in his employment after its circumstances were known to him. *Lynch* v. *Boston & Maine Railroad*, 403.

38. A carpenter who in doing work which he has been employed to do has been invited to use a buzz planer, the floor surrounding which continuously is covered by shavings, and who is injured by falling against the buzz planer by reason of stumbling on an old nail protruding from the floor and hidden by the shavings, is not as matter of law negligent because he has walked to the buzz planer over the floor covered by shavings without sweeping them away and examining the condition of the floor, nor is the risk of injury from the nail, thus continuously covered, assumed by him, it not being an obvious one. *Young* v. *Snell*, 242.

39. In an action by a carpenter, employed by the defendant to build an addition to his planing mill, for having parts of two fingers cut off by a buzz planer, which he had been invited to use, and against which he fell when he had stumbled by reason of his foot catching on something on the floor which was covered with shavings, the plaintiff's evidence showed that a week after the accident he went with another carpenter to the place where it occurred and found an old bent nail sticking up in the floor at the distance of about eighteen inches from the bottom of the planer "where it came directly in the way of his right foot," that it protruded above the floor from an inch to an inch and three quarters, that it was in a depression worn in the floor that the depression looked old, that the nail looked old and was bent over and was worn and shiny, as if it had been trampled on, and there was evidence that the shavings on the floor had not been cleaned up between the time of the accident and the time that the plaintiff found the nail. *Held*, that the evidence warranted the jury in finding that the nail found by the plaintiff a week after the accident was there before the accident and was the cause of it, and that on proper inspection it would have been found by the defendant. *Ibid.*

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40. At the trial of an action by an employee against his employer, to recover for personal injuries alleged to have been received by reason of the plaintiff's being crushed against a post in the defendant's mill in Fall River by the sudden opening of doors in a floor to permit a freight elevator to come up, there was evidence tending to show that the plaintiff was in the exercise of due care and that he had not assumed the risk of the injury, and that the elevator was not equipped, as required by R. L. c. 104, § 27, with "a suitable device which shall act as a danger signal to warn people" of its approach, although no inspector, as provided by the statute, had approved of the use of the elevator without the device, and the nature of the business was not such that the necessity for the device would not warrant the expense. The presiding judge directed a verdict for the defendant. *Held*, that the case should have been submitted to the jury. *Doolan* v. *Pocasset Manuf. Co.* 200.

41. At the trial of an action by an employee against his employer, to recover for personal injuries alleged to have been received by reason of the plaintiff's being crushed against a post in the defendant's mill by the sudden opening of doors in a floor to permit a freight elevator to come up, there was evidence tending to show that there were no signals to warn people of the elevator's approach, that the plaintiff when injured was fifteen years of age and was mentally deficient, that he never had been warned of the danger attending the use of the elevator through the floor, that when injured he had been at work for the defendant but two days and, just before the accident, had been told to clean the elevator doors in the floor and was doing so when injured, and that his attention had not been called to the absence of warning signals. It did not appear that the absence of the warning signals could have been discovered by mere ocular inspection or in any other way than by observing that the only warning given was by the movement of the elevator ropes which came up through the floor or by the opening of the doors. *Held*, that there was evidence warranting a finding that the plaintiff was in the exercise of due care; *also*, that he had not assumed the risk of the injury as matter of law. *Ibid.*

42. At the trial of an action against a contractor to recover for personal injuries, received by the plaintiff while employed by the defendant in the erection of a building of many stories of steel construction with granite walls, alleged in one count of the declaration under R. L. c. 106, § 71, cl. 2, to have been caused by the negligence of a superintendent of the defendant, and alleged in another count to have been caused by the negligence of the defendant in failing to furnish the plaintiff with a suitable place in which to work, it appeared that the tenth floor of the building had been laid in terra cotta, and that many planks had been placed thereon, resting on the iron beams and the terra cotta, chiefly for the protection of the floor but also for the support of stones being used in the construction of the walls of the next story of the building and for a convenient way for workmen to walk upon. A runway of planks was so constructed along the side of the wall, upon which the masons stood as they worked and along which the plaintiff and others passed in carrying stones to be placed upon the wall. All the planks were placed in position by the workmen as they were

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needed and were not fastened down. There were holes left in the terra cotta flooring between the beams for wires or pipes to be placed in. There was uncontradicted testimony by the plaintiff and others that this method of laying planks and leaving holes in the terra cotta was usual and proper. While carrying a stone along the runway with another workman whom he was following, the plaintiff stepped upon the end of a plank which did not rest upon a beam but was over a hole in the terra cotta, the end went down and the plaintiff fell and was injured. It did not appear how the end of the plank happened to be so placed, but the condition of the plank before the accident was obvious. The plaintiff had been accustomed to work upon buildings of this kind for six years. *Held*, that as a matter of law the plaintiff had assumed the risk of the injury; *also*, that there was no evidence of negligence of the defendant; and, *also*, that there was no evidence of negligence of the superintendent, since to require a constant inspection of the planks where they were placed over the holes would be imposing upon the builder an unreasonable responsibility. *Eisner* v. *Horton*, 507.

Insufficient number of fellow workmen.

43. If a man, who theretofore has been employed as a machinist's helper and never has worked in hoisting heavy casting into place in setting up a stationary steam engine, is sent to help in such work under the immediate supervision of a superintendent, and, with another man, is ordered to hoist a heavy casting by pulling the chain of a fall, he has a right to assume, while obeying this order, that sufficient precaution has been taken to prevent the casting as it rises from the ground from swinging in too quickly before being lowered to its final position, and he is not negligent as matter of law in failing to appreciate fully the danger that a fellow servant in charge of a guy rope attached to the casting may be unable to prevent the rope from slipping and the casting from swinging forward so rapidly as to strike him before he can get out of the way; nor does he assume the risk of such an accident. *Bowie* v. *Coffin Valve Co.* 571.

44. In an action by a workman against a corporation manufacturing and undertaking to set up stationary steam engines, by which he was employed, without previous experience, to help in setting up such an engine under the personal supervision of a superintendent, for personal injuries from a heavy casting swinging upon him when in obedience to the order of the superintendent he with another workman had begun to hoist it by pulling on the chain of a fall for the purpose of setting it in place, where it appears that the selection and use of the appliances, their proper adjustment, the method of operation and the number of men who should be at the fall and of those managing the guy rope attached to the casting were all within the supervision and control of the superintendent who gave the order, if there is evidence that the accident was caused by the fact that only one man was at the guy rope and was unable to prevent it from slipping so that the casting swung forward rapidly and struck the plaintiff before he could get out of the way, it is a question for the jury whether the superintendent was negligent in failing to provide a sufficient number of men to

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steady the load or in failing to adopt a different method of hoisting. *Bowie* v. *Coffin Valve Co.* 571.

45. In an action by a workman against an engine company, by which he was employed to help in setting up a stationary steam engine, for personal injuries from a heavy casting swinging upon him, when in obedience to the order of the superintendent in charge he with another workman had begun to hoist the casting by pulling on the chain of a fall for the purpose of setting it in place, upon the question of fact whether one man at the guy rope attached to the casting would be sufficient to prevent the casting as it was being raised into position from swinging in too rapidly toward the base where it was to rest, it is within the discretion of the presiding judge whether to admit the opinion of an expert as an aid to the jury or whether to exclude the expert testimony and to leave the question, in regard to such a simple mechanical operation not requiring technical skill, to be passed upon by the jury in the light of their common knowledge. *Ibid.*

Incompetence of fellow workman.

46. At the trial of an action of tort for personal injuries alleged to have been received by the plaintiff while in the defendant's employ, by reason of the incompetence of a workman furnished by the defendant to work with him, there was evidence tending to show that it was the plaintiff's duty to act as the superior one of two workmen in the operation of a large and complicated machine, that occasionally the machine would have to be stopped because of becoming clogged, when both he and his fellow workman would have to clean it out, and that it frequently was necessary for him to give directions to the fellow workman; that, half an hour before the accident occurred, the alleged incompetent fellow workman was sent by the defendant to work with the plaintiff, that he could speak only French, while the plaintiff could speak only English, and that the plaintiff did not know that the fellow workman could not speak English; that the machine, becoming clogged, was stopped and the plaintiff and the fellow workman were at work cleaning it out, when the fellow workman started it up a little and the plaintiff's fingers became caught, that the plaintiff thereupon in English directed the fellow workman to turn off the power, but, instead, he turned it on, and the plaintiff lost his fingers; that, if the power had been turned off, the plaintiff could have extricated his fingers without injury. *Held*, that there was evidence warranting findings that, because he could not speak English, the fellow workman was incompetent for the work to which the defendant assigned him; that the defendant knew he could not speak English; that the plaintiff's injury resulted from such incompetence, and therefore that the defendant was liable. *Beers* v. *Isaac Prouty Co.* 19.

Street Railway.

Injury to person working in highway.

47. At the trial of an action of tort against a street railway company to recover for the death of the plaintiff's intestate, which was alleged to have been caused by his being run over by reason of gross negligence on the

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part of the motorman of a car of the defendant, there was evidence tending to show that the plaintiff's intestate was an Italian, who at the time of the accident was working in a trench which was being dug for sewer pipes in a highway, that at the side of the trench was a pile of gravel and stones and, beyond it, the defendant's tracks; that just before the accident a tip cart had been driven upon the pile of gravel and stones and the plaintiff's intestate and others were engaged in the work of causing it to dump its load, the plaintiff's intestate bending over and pushing down on one end of the cart and having his back toward the direction from which the car came, that the hubs of the cart wheels were at least three feet from the nearer rail of the street railway track, and that the overhang of the defendant's car was not more than twelve inches; that the foreman under whom the plaintiff's intestate was working, seeing the car approaching, called out to the motorman, who was looking in his direction all the time, to stop, and, upon his failing to slacken his speed, motioned to him with his hand to stop, and then called to the plaintiff's intestate to "look out for the car"; that thereupon the plaintiff's intestate straightened up and brought his body so near the track that the car struck him upon the hip, whereupon he fell, rolled under the car and was killed, his body being dragged at least eight feet and the car running at least forty-six feet after it struck him; that the motorman was under orders from the defendant's superintendent to run not faster than four miles an hour when passing the sewer excavation, and that at the time of the accident he was disobeying the order and that the car was going faster than five miles an hour. One witness testified that the car was going "in a hurry; fast." *Held*, that the evidence would not warrant a finding that the motorman was guilty of gross negligence. *Dimauro* v. *Linwood Street Railway*, 147.

Injury to traveller on highway.

48. Evidence that the motorman of an electric car, in approaching a driveway leading from a dwelling house directly upon the electric car tracks in the highway at a time which was not the car's regular time, ran the car at an excessive rate of speed and without any warning signals, that when more than one hundred feet from the driveway he saw a carriage coming out on it, that he could have stopped his car within that distance, but, instead of doing so, although applying his brakes at first, he then put on the power and tried to get past the end of the driveway before the carriage reached the car tracks, and that the car ran into the carriage, will warrant a finding that the collision was caused by the motorman's negligence. *Peabody* v. *Haverhill, Georgetown & Danvers Street Railway*, 277.

49. In an action by a woman against a street railway company for personal injuries alleged to have been received from being thrown from a buggy when it was run into by an electric car of the defendant, there was evidence tending to show that the buggy was a Goddard buggy and was the property of and was being driven by a son of the plaintiff, who was twenty years of age, that the plaintiff was in it on the invitation of her son, that it was being driven down a driveway to the street in front of her house on

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which the tracks of the defendant ran, that the top of the buggy was up and that there were obstructions which cut off her view of the street in the direction from which the car came. A third occupant of the buggy testified that at a suitable place the plaintiff looked in the direction from which the car came. There also was evidence tending to show that there was a noisy brook in the immediate neighborhood, that the car was behindhand, running fast, and that no warning signal was given as it approached. At the time of the trial the plaintiff was insane and unable to testify. *Held*, that there was evidence warranting a finding that the plaintiff was in the exercise of due care. *Peabody* v. *Haverhill, Georgetown & Danvers Street Railway*, 277.

Action by cripple sixty years of age who was struck by street car as he was crossing street after he had refused to heed a warning to turn back, held not maintainable, see *post*, 64.

Injury to passenger.

50. A common carrier of passengers is required to exercise toward them only the highest degree of care which is consistent with the transaction of its business, and a street railway corporation is not to be held liable for an accident caused to one of its passengers by a defect in a switch merely because greater care in the examination of the condition of the switch would have prevented the accident, if the corporation exercised as much care in examining the switch as was consistent with the practical operation of its railway. *Carroll* v. *Boston Elevated Railway*, 527.

51. In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car in which the plaintiff was a passenger, alleged to have been due to a broken and defective switch, the plaintiff, after showing that he was in the exercise of due care, can establish a *prima facie* case by proving the derailment, but the defendant can rebut this presumption of fact by showing that it was not negligent, and the burden of proving the defendant's negligence remains upon the plaintiff as before. If the defendant introduces evidence from which the jury can find that it used due care in the construction, equipment and maintenance of its railway, this is sufficient to warrant a verdict in its favor without its accounting for the accident. *Ibid.*

52. The mere fact that an electric car becomes derailed because of negligence on the part of the street railway company operating it does not give to a passenger thereon a right of recovery in tort against the company, unless he suffered damage therefrom. *Sullivan* v. *Old Colony Street Railway*, 303.

53. Where, at the trial of an action of tort against a street railway company for damages alleged to have been received by a passenger by reason of the derailment of the car upon which he was riding, it is admitted by the defendant that the derailment was caused by its negligence and the plaintiff introduces evidence of damage resulting to him, nevertheless a verdict should not be directed for the plaintiff, since the jury are not bound to believe the evidence of the plaintiff as to damages. *Ibid.*

54. Where an electric car is derailed by reason of negligence on the part of

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the operating company, and a passenger thereon is thereby prevented from reaching his destination, the company is not necessarily liable for all of the consequences of the defendant's failure to transport the passenger to his destination, since it would not be liable for such of the consequences as could have been avoided by the plaintiff's conducting himself as a reasonable man would have done under the circumstances. *Sullivan* v. *Old Colony Street Railway*, 303.

55. At the trial of an action of tort against a street railway company by a passenger to recover for damages alleged to have been suffered by the plaintiff by reason of the derailment of the car upon which he was riding, the plaintiff alleged and introduced evidence tending to show that he waited three hours in the night while the car was being put back upon the track and, in consequence thereof, missed a car which would have taken him to his destination and was compelled to sleep in a car barn over night. Evidence introduced by the defendant tended to show that, shortly after the car left the track, an announcement was made near to the plaintiff by an employee of the defendant in a loud voice that the passengers by walking about a mile could reach another car which would seasonably take them to the destination which was the plaintiff's, but that the plaintiff did not adopt the suggestion. The plaintiff testified that he did not hear the announcement. The derailment of the car was admitted to be due to negligence of the defendant, but the question of the defendant's liability was left to the jury under instructions to the effect that, if they should find that the defendant as it contended properly notified the plaintiff and the other passengers and that the damages suffered by the plaintiff were due to his failure to conduct himself as a reasonable man should have under the circumstances, their verdict should be for the defendant. The jury found for the defendant. *Held*, that the charge was proper and that the finding of the jury was warranted. *Ibid.*

56. The mere facts, that one boarded an open electric car while it was moving slowly and at a point between two of the regular stopping places of the car on a street crowded with traffic, will not preclude such person from recovering from the street railway company for injuries received by him by reason of the car's negligently being caused to run into too close proximity to a wagon in the street, if it also appears that he had been accepted as a passenger. *Lockwood* v. *Boston Elevated Railway*, 537.

57. At the trial of an action against a street railway company to recover for injuries alleged to have been received by the plaintiff while he was a passenger upon an open electric car of the defendant and to have resulted from the car's negligently having been caused to come in collision with a wagon in the street, there was evidence tending to show that the plaintiff and a companion signalled from the sidewalk of a crowded street for the car to stop and, the motorman having inclined his head, started from the sidewalk, passed behind a wagon and, the car having stopped, got upon the running board; that the wagon, which the plaintiff and his companion had passed behind to reach the car, continued on ahead of and in close proximity to the car and that both the conductor and the motorman saw it, that on a signal from the conductor, who had seen the plaintiff getting

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upon the car, the car proceeded before the plaintiff could take a seat, and the wagon struck the plaintiff's companion and knocked him against the plaintiff, who in the act of taking a seat had one foot on the car floor and one on the running board, and caused him to fall into the street. Subject to exceptions by the defendant, the presiding judge submitted the case to the jury, who found for the plaintiff. *Held*, that the exceptions must be overruled, since there was evidence from which the jury were warranted in finding that the plaintiff had been accepted by the defendant as a passenger and was in the exercise of due care, that the motorman and the conductor were negligent and that their negligence, in causing the plaintiff's companion to be knocked against him and thus to throw him from the car, was the proximate cause of the plaintiff's injury. *Lockwood* v. *Boston Elevated Railway*, 537.

58. At the trial of an action of tort against a street railway company, brought by a woman to recover for personal injuries alleged to have been received by her because, while she was entering a car of the defendant at the rear platform, the car was started so suddenly as to cause her to fall upon the platform, there was evidence tending to show that the car was a small, closed electric car, that the plaintiff, in the act of entering the car, had one foot on the platform and was in the act of bringing the other foot from the step up to the platform, in the meantime having a good hold upon a brass rod which ran across a back window of the car immediately at her right, when, at a signal from the conductor to the motorman, the car was started so suddenly that her good hold was broken, she was thrown against an electric controller at the back of the platform, and then fell to the floor. *Held*, that there was evidence of negligence of the conductor in starting the car too soon, and of the motorman in starting it with too violent a jerk. *Lacour* v. *Springfield Street Railway*, 34.

Refusal by presiding judge to exclude certain question asked of witness who had been qualified as expert and was testifying at trial of action against street railway company for injuries due to derailment of car was held to have been warranted, see EVIDENCE, 7.

Of street railway company as employer.

Liability of street railway companies as employers for injuries to employees, see *ante*, 6, 7, 29.

Railroad.

59. If an old man approaches a railroad crossing on a highway, after a freight train has passed over it and has stopped leaving the end of the rear car extending three or four feet into the street at the crossing, and sees the flagman with his flag standing in the street guarding the crossing, and if, with his back turned toward the flagman, he stands on the planking between the rails of the track and engages in conversation with the conductor of the freight train, who is on the platform of the rear car, and, while he is standing in this way within a foot or two of the end of the train, the engine with a car attached to it backs down to be recoupled to the train, and in doing so forces back the train so that the end of the rear car knocks down the old man and injures him, causing his death after

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conscious suffering, his administrator cannot recover either for his conscious suffering or for his death, as he was not in the exercise of due care. *White* v. *New York, New Haven, & Hartford Railroad*, 441.

Liability of railroad companies as employers for injuries to employees, see *ante*, 16–20, 37.

In Use of Highway.

60. There is no absolute rule of law requiring one, before dismounting from a street car into a street, to look up and down the street to see whether there is any danger from passing vehicles. *McGourty* v. *DeMarco*, 57.

61. One, who is dismounting into a street from a street car, has a right to expect that any one driving up from behind the car will exercise proper care to avoid running into him. *Ibid.*

62. The fact that, in passing from behind an electric street car which has stopped to let off passengers, the driver of the team goes to the right of the car, instead of to the left as required by R. L. c. 54, § 2, is evidence of negligence on his part. *Ibid.*

63. At the trial of an action of tort against one who, while driving a team upon a public highway upon which were street railway tracks, ran into the plaintiff who had alighted from a street car, there was evidence tending to show that the street cars generally stopped to let off passengers, not where the car stopped on the occasion in question, but at a point marked by a white post seventy-five feet farther on; that the car was an open car and had just passed the team of the defendant, which was being driven on the right side of the street, that, as the car stopped, the plaintiff arose and attempted to look backward up the street, but was unable to do so because of passengers standing on the running board of the car, that, after the car had come to a full stop, he took a child in one arm, and dismounted on the right hand side and facing the front of the car, and was struck by the defendant's team coming from behind. *Held*, that there was evidence from which the jury were warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent. *Ibid.*

64. If a cripple about sixty years of age, who walks with a crutch very slowly, while on his way home on a bright clear evening and about to cross a well-lighted and unobstructed street, sees, before leaving the sidewalk, a lighted electric car approaching from a considerable distance at the rate of from six to nine miles an hour, and thereupon, thinking that he has time to cross, without looking again toward the car and without heeding a loud warning cry from a person attempting to rescue him, walks in front of the car and is struck and injured, he is not in the exercise of due care. *Callaghan* v. *Boston Elevated Railway*, 450.

Action by traveller upon highway against one operating automobile thereon for injuries received by plaintiff by being run into from behind on dark night, see EVIDENCE, 4, 5.

Action against coal company to recover for injuries received from falling into coal hole in sidewalk alleged to have been left open and unguarded negligently by employees of defendant, see *post*, 73.

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Law of the road, R. L. c. 54, § 2, requires that driver of team passing from behind electric car which has stopped to let off passengers shall pass to the left of the middle of the travelled part of the way, see LAW OF THE ROAD.

Leaving for long time rope stretched along the highway while there was cessation of work of moving building, for which rope was used, held not to be defect in highway for which, under circumstances, town would be liable, it not appearing that town knew or should have known of alleged defect, see WAY, 4.

Gross.

65. Statement by LORING, J., of what this court has decided to be the "gross negligence" of a servant, agent or employee, which, when it causes death, is the basis of an action on behalf of the widow or next of kin of the person whose life is lost against the employer of the person who was grossly negligent. *Dimauro* v. *Linwood Street Railway*, 147.

Action to recover for death of workman in highway run into by passing electric street car, see *ante*, 47.

Causing Death.

66. Review by RUGG, J., of legislation in this Commonwealth giving a remedy for death caused by the negligence of persons or corporations or the unfitness or negligence of their agents or servants. *Brooks* v. *Fitchburg & Leominster Street Railway*, 8.

67. R. L. c. 171, § 2, as amended by St. 1907, c. 375, giving a remedy for a death caused by the negligence of a person or corporation or the agents or servants thereof, does not apply to a death caused by the negligence of a street railway corporation or its agents or servants, the remedy for such a death given by St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392, being exclusive. *Ibid.*

Action against employer of boy to recover for his death from falling down elevator well because gate was left open held not to be maintainable because there was no evidence that boy was in exercise of due care, see *ante*, 3.

Action to recover for death of person employed by railroad company to carry mail to and from trains, who was run over by train passing through station, see *ante*, 20.

Action for death of old man who was struck by train backing upon crossing as he stood thereon with his back to train talking with flagman was held not to be maintainable because of lack of evidence of due care on part of deceased, see *ante*, 59.

Action for death of one killed while, in course of employment, he was repairing leak in roof of building near electric light wires was held not to be maintainable because of lack of evidence that deceased was in exercise of due care, see *post*, 72.

Questions of pleading, practice, sufficiency of notice and of evidence in action against employer to recover for death of employee due to elevator's falling because of its defective condition, see EMPLOYERS' LIABILITY ACT, 1–4; PRACTICE, CIVIL, 2, 13, 14; *ante*, 1, 30–32.

Statement of what this court has decided to be the "gross negligence" of a

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servant, agent or employee, which, when it causes death, is basis of action on behalf of widow or next of kin of person whose life is lost against employer of person grossly negligent, see *ante*, 65.

Action to recover for death of workman in highway run into by passing electric street car, see *ante*, 47.

Of one owning or controlling Real Estate.

68. A landowner, who for the purposes of his business constructs a street over his land, which remains a private way but from which it is impracticable to exclude the public without interfering with his own convenient use of the way, and who posts and maintains notices at different places where public streets open into his private street, indicating that it is a private way, does not invite the public to use his private street but merely permits them to do so, and his only duty to travellers on his street is not to injure them intentionally or wantonly. *Bowler* v. *Pacific Mills*, 364.

69. It is not negligence on the part of one who owns a lot of land in a city, abutting upon a street with a considerable grade, to build thereon a four story block with two stores on the first floor opening upon the street with their entrance doors set back from it, and, between them, an entrance and hallway also set back from the street and leading to the upper floors of the building, and in so doing to leave the floor in front of the entrances open to the sidewalk and to make the floor of the entrance to the lower store three and a quarter inches lower than the floor of the entrance to the hall leading to the upper floors with a riser of that height between the two but with nothing to prevent persons from passing back and forth between the higher and lower portion of the flooring where the riser is, or to warn them of any risk in so doing; and, if a customer in the lower store, in leaving it and attempting to walk from the lower portion of the entrance floor to the higher, stumbles upon the riser and is injured, he cannot maintain an action against such owner. *Hoyt* v. *Woodbury*, 343.

70. If a woman, on going to a store where she often has transacted business, finds that repairs are going on and that a scaffolding has been built across the front, and enters by a new entrance through a narrow passageway, under the scaffolding, and through a doorway of half the ordinary size, which is reached by ascending two steps and which is open and leads into the store where business is going on, and notices as she goes in mortar or plaster upon the steps, some of which is dry and powdery as though it had been trampled on and spread around, and some of which is in lumps, so that she has to pick her way into the store, and if, after remaining in the store about five minutes, she comes out and slips on the steps, either on the powdery substance or upon a lump, and is injured, she is not negligent as matter of law in having entered the store which she was invited to enter in spite of her noticing the conditions which might cause her to slip, and, in an action against the proprietor of the store for her injuries, the question of her due care is for the jury. *Frost* v. *McCarthy*, 445.

71. If the proprietor of a store on one of the principal streets of a large city provides a temporary entrance for his customers, while repairs are going on, and in doing so allows two smooth steps, made of cement and glass set

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in an iron framework, which lead from a narrow passageway under a scaffolding to a narrow doorway by which the store is entered, to become sprinkled with mortar or plaster, some of which is powdery and some in lumps, and it appears that mortar splashed upon the steps has dried and has been trodden into the store and upon the sidewalk by the feet of persons passing over it, and if owing to this condition of things one of his customers slips on the steps and is injured, in an action brought against him by such customer for the injuries thus caused, the question of the defendant's negligence is for the jury, and there is evidence to warrant a finding that the situation had existed under such circumstances and for such a period of time that in the exercise of reasonable care for the safety of his customers the defendant ought to have known about it. *Frost* v. *McCarthy*, 445.

In Use of Electricity.

72. In an action by the administratrix of the estate of one who had been employed as a general repair man in a factory building, against an electric light company, whose wires, carrying a current of electricity more than sufficient to destroy human life, were attached to an upright pole with a cross arm upon the roof of the factory by permission of its proprietor, for causing the death and conscious suffering of the plaintiff's intestate by means of an electric shock received by him when in the course of his duty he had gone to the roof to repair a leak, it appeared that the plaintiff's intestate in some way received an electric shock and at some time after receiving it fell from the roof of the factory to the roof of a shed below, that he was conscious when assistance reached him and remained so for three quarters of an hour, when he died, that both of his hands were burned badly, the right one through to the bone, and that the back of his neck also was burned badly. A witness testified that, his attention being attracted by the groans of the intestate, he looked up and saw him on the roof of the factory, that he was on his back and was squirming around with his hands over the wire or two wires. No one saw the accident or testified to the manner in which it occurred. *Held*, that there was nothing to show that the plaintiff's intestate was in the exercise of due care, and that, as the manner of the accident was purely a matter of conjecture, a verdict properly was ordered for the defendant. *Ralph* v. *Cambridge Electric Light Co.* 566.

In Use of Automobile.

Action by traveller on highway to recover for injuries received from being run into by automobile driven by defendant, see EVIDENCE, 4, 5.

In Use of Firearms.

Action against proprietor of teaming business for injury to plaintiff from discharge of magazine gun which foreman had lent to defendant and which defendant had returned to foreman, in whose hands it exploded as he was demonstrating its use to fellow laborer, see NEGLIGENCE, 4, 27.

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Coal Hole.

78. In an action against a coal company for personal injuries from falling down a coal hole in the sidewalk of a city street, which was negligently left open and unguarded by the servants of the defendant, there was evidence that the accident happened late in a snowy afternoon in the month of January, when it was very dark, that the plaintiff saw the defendant's coal team at the sidewalk and supposed that coal was being delivered from it into a coal hole, that he went into the street to go around the horses' heads, but, finding the street slushy, returned to the sidewalk, that he walked close to the side of the building and could not see any coal, that he saw something black on the sidewalk close to the rear of the team and a man poking a few pieces of coal left in the cart and thought that the delivery of the coal was finished and that the coal hole was closed, that, while thus going close to the building so that his shoulder was four or five inches from it, he fell into the coal hole, which was rectangular and measured twenty-two inches by thirty-four inches, whereas the ordinary coal hole is circular and is from twelve to fifteen inches in diameter. On cross-examination the plaintiff testified that he went around the team to avoid disaster, that "the disaster might have been a coal heap," and that he did not look to see whether any coal hole was there. *Held*, that there was evidence for the jury that the plaintiff was in the exercise of due care; that the fact that the plaintiff did not look for the coal hole might have been due to the darkness being so dense that looking would not have disclosed its situation, and that his statement, elicited on cross-examination, that he went into the street to avoid disaster, and then, on finding it slushy, returned to the sidewalk, did not as matter of law show knowledge of the danger and appreciation of its extent. *Picquett* v. *Wellington-Wild Coal Co.* 470.

In a Brewery.

Action for personal injuries alleged to have been received by plaintiff while in brewery assisting employee of defendant whose negligence caused the injury, held not maintainable because on facts plaintiff was fellow servant of negligent employee, and not employee of third party, see AGENCY, 4, 5.

In hoisting Machinery.

Action by machinist's helper for injuries received by him while assisting in hoisting and setting heavy castings, cause of injury being improper method adopted by him and others by direction of superintendent, see *ante*, 5, 43–45.

Elevator.

Questions of pleading, practice, sufficiency of notice and of evidence in action against employer to recover for death of employee due to elevator's falling because of its defective condition, see EMPLOYERS' LIABILITY ACT, 1–4; PRACTICE, CIVIL, 2, 13, 14; *ante*, 1, 30–32.

Action by employee in mill against employer to recover for personal injuries

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alleged to have been received by reason of plaintiff's being crushed against post by sudden opening of doors in floor to permit freight elevator to come up, see *ante*, 40, 41.

Action against employer of boy in factory to recover for death of boy due to his falling down elevator well because gate was left open, held not to be maintainable because there was no evidence that boy was in exercise of due care, see *ante*, 3.

In a Mill.

Action by employee in grain mill against his employer to recover for injuries due to his finger's being caught between rollers in roller mill when he supposed mill had stopped, see *ante*, 35.

Action by carpenter, employed by defendant in building extension to mill, to recover for injuries caused by his stumbling on nail protruding from floor and covered continuously with shavings, see *ante*, 38, 39.

In a Factory.

Action by employee injured by reason of defective pulley on buzz planer in factory, see *ante*, 21, 22.

Action by inexperienced boy of nineteen for injuries due to defect in spreader behind circular saw with which he was directed to work, see *ante*, 23, 24.

Action for injury to employee in box factory alleged to have been caused by defendant's furnishing fellow servant who was incompetent by reason of his being unable to speak same language as plaintiff, see *ante*, 46.

Action against employer of boy in factory to recover for death of boy, due to his falling down elevator well because gate was left open, held not to be maintainable because there was no evidence that boy was in exercise of due care, see *ante*, 3.

Action against landlord who had leased factory to plaintiff and had agreed to furnish power therefor during working hours, for personal injuries resulting to plaintiff from landlord's negligently turning on power at time not in working hours, see LANDLORD AND TENANT, 3.

In a Factory Yard.

Action against employer by one employed on engine in factory yard, to recover for injuries received in collision, see *ante*, 13–15.

In Construction Work.

Action by employee against employer for injuries alleged to have been received by plaintiff through falling of temporary staging upon which he was working, due to defective material from which it was made, see *ante*, 36.

Action by employee of contractor, erecting high building with terra cotta floors, to recover for injuries received from stepping into hole in flooring while at work in helping to construct building, see *ante*, 42.

Action by employee to recover for injuries received from stone falling upon him while he was assisting to lift it in place, see *ante*, 8–10.

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Of Stevedore.

Action by employee of stevedore against employer for injuries resulting from breaking of rope sling supporting staging, see *ante*, 11, 12, 25, 26; EVIDENCE, 9.

Of Charitable Corporation.

Charitable corporation is not liable for injuries caused by negligence of its servants or agents properly selected, see CHARITY, 6.

Proximate Cause.

Act of proprietor of teaming business in returning to his foreman, without taking precautions to see if it still was loaded, magazine gun which foreman had lent him to use in shooting cat, is not proximate cause of injury to employee due to exploding of gun as foreman was demonstrating it to another employee, see *ante*, 27.

Negligence of employees of street railway company in running car in too close proximity to wagon ahead of car in street held to be proximate cause of injury to passenger on running board who was caused to fall from car by person on running board in front of him coming into contact with wagon and thus being thrown against him, see *ante*, 57.

Res ipsa loquitur.

Sudden and automatic starting of old and improperly repaired loom *held* to be some evidence of defective condition, see *ante*, 34.

Rebutting by defendant in action by passenger against street railway company, of *prima facie* case established by application of doctrine of *res ipsa loquitur*, see *ante*, 51.

NEW TRIAL.

Of actions at law, see PRACTICE, CIVIL, 17–20.
Of indictments, see PRACTICE, CRIMINAL, 2.

NOTICE.

Under R. L. c. 106, § 75, see EMPLOYERS' LIABILITY ACT, 1–4.

Notice by bank with regard to money deposited with it under order of Probate Court under R. L. c. 150, § 23, as unclaimed funds in an estate, should be sent to judge of probate, see PROBATE COURT, 4; EVIDENCE, 1; AGENCY, 1.

Person entitled to such money is not estopped to deny that proper notice was given by fact that it was sent to him erroneously, see ESTOPPEL.

NUISANCE.

Action, by one entering for purposes of trade store which proprietor had kept open for business although repairs were going on there, to recover for injuries received because of condition of floor caused by progress of such repairs, see NEGLIGENCE, 71.

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OBSCENE LITERATURE.

1. At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, it is not necessary for the presiding judge to explain at length to the jury the meaning of the words "obscene," "indecent," "impure" and "manifestly," as these words are not technical terms but are common words to be understood in their common meaning by an ordinary jury. *Commonwealth* v. *Buckley*, 346.
2. At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, there is no error in giving to the jury the following instruction: "Obscenity means offensive to morality, to chastity, indecent, nasty. Impure explains itself. Language is offensive, impure and indecent when it manifestly tends to incite in the minds of people susceptible to such influences obscene thoughts, impure thoughts, indecent thoughts," and in giving no further definition of the words of the statute. *Ibid.*
3. At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the defendant asked the presiding judge to instruct the jury that they had "a right to take into consideration other works of literature, religious, historical, or fiction widely read in the community, the language thereof, and the subjects discussed and the scenes and incidents described therein." The judge refused to give this instruction, and instructed the jury as follows: "It is entirely immaterial whether other books are as bad or worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; and it makes no difference whether you think there are other books in circulation worse than this or not; you are only trying this one." *Held*, that the request was refused rightly and that the language of the charge stated the law on the subject matter of the request accurately and sufficiently. *Ibid.*
4. At the trial of an indictment under R. L. c. 212, § 20, charging the defendant with selling a book containing obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the defendant asked the presiding judge to rule that the jury had a right to consider the apparent intent and purpose of the story as a whole, and that whether the language referred to was such as was described in the indictment should be determined by consideration of the contents of the whole book. The judge refused to make these rulings in the form requested and instructed the jury that the defendant was being tried only with regard to such parts of the book as the government complained of, and that it made no difference what the object in writing the book was or what its whole tone was, if the pages complained of and the language set out in the bill of particulars were, in the opinion of the jury, obscene, indecent and im-

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pure, and manifestly tended to corrupt the morals of youth. He previously had instructed the jury that they must determine this question "from the language used and from such other parts" of the book as were "necessary to explain that language." *Held*, that the subject of the request was treated sufficiently in the charge, and that there was no error in the instructions given. *Commonwealth* v. *Buckley*, 346.

PARENT AND CHILD.

Mere relation of parent and child held not to cause negligence of son twenty years of age in driving horse and carriage owned by him to be imputed to his mother who was in carriage with him, see NEGLIGENCE, 2.

PARTNERSHIP.

Suit in equity, by one of members of copartnership against person to whom he had paid certain money of partnership and assigned certain property of his own to be used for benefit of firm, for accounting, was held to have been brought properly by plaintiff alone, his agreement with defendant having been made by him as trustee for firm, see EQUITY PLEADING AND PRACTICE, 2.

PASSENGER.

Evidence at trial of action against street railway company by one pushed from running board of open electric car by having person in front being knocked against him through car's running against wagon in street, held to warrant finding that plaintiff, who had signalled car and had boarded it while it was in motion, was accepted as passenger and was injured through negligence of defendant, see NEGLIGENCE, 57; STREET RAILWAY, 2.

Actions by passengers against street railway companies to recover for personal injuries, see NEGLIGENCE, 50–58.

PAYMENT.

Evidence that, for the purpose of paying a debt, a debtor gave to his creditor three notes for $100 each, payable at future dates, which the creditor entered upon his books, "3 notes $100 — $300," that two of the notes were paid but that the third remained unpaid and was taken up by the creditor who thereupon changed the entry on his book to read, "2 notes $100 — $200," and surrendered the unpaid note to the debtor, will warrant a finding that the third note was not accepted as absolute payment and that the debtor need not be credited therewith. *Davidson* v. *Stewart*, 393.

Certain promissory note given to insurance company held not to be payment of premium due under policy, see INSURANCE, 4.

Payment by one of executors of will of deceased person, made on note due from estate, against objection of another executor, intended to remove bar of statute of limitations, was not allowed to do so in suit in equity to enforce note, because it appeared that person benefited by such removal was executor who made payment, see EXECUTOR AND ADMINISTRATOR, 1, 2.

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PERJURY.

At trial of indictment for perjury containing two counts, evidence material to issue raised by either count cannot be taken wholly from consideration of jury, see PRACTICE, CRIMINAL, 1.

Indictment charging in two counts that defendant testified falsely with regard to an assault and the throwing of a stone in a public highway, which was held to charge separate offenses, see PLEADING, CRIMINAL.

PHYSICIANS AND SURGEONS.

Action against physician by husband of patient for breach of implied contract in unskilful performance of professional services which resulted in death of wife, see CONTRACT, 22–24.

PLEADING, CIVIL.

Declaration.

In actions of contract.

1. Under our practice act the *ad damnum* is a sufficient allegation of damage in actions of contract as well as in actions of tort in all cases in which special damages are not claimed. *Sherlag* v. *Kelley*, 232.
2. It is a general rule of pleading that a breach of contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not show that there was such a breach. *Ibid.*
3. In an action by a husband against a physician for a breach of his implied contract to perform his professional services with skill and care when employed by the plaintiff to attend the plaintiff's wife, where there was no averment of expenses incurred by the plaintiff by reason of the defendant's breach of contract, and the declaration contained merely a statement of the contract and an allegation of the breach of it, the only allegation of damage being in the *ad damnum*, the court did not consider the question whether further averments would be necessary to entitle the plaintiff to recover more than nominal damages, the only question before the court being whether the plaintiff had a right of action for damages either nominal or substantial. *Ibid.*

Averment in declaration in action of contract that defendant refused to receive or pay for pig iron which he had contracted in writing to buy of plaintiff and pay for in thirty days from arrival of each car was held to be sufficient allegation of breach of contract, see CONTRACT, 17.

In actions of tort.

4. In an action by an employee against his employer to recover for injuries due to a dangerous or defective condition of the surroundings in which or the machinery with which the plaintiff was directed to work, it is not necessary for the plaintiff, in order to rely upon the fact that he was men-

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tally deficient, to allege such deficiency in his declaration. *Doolan* v. *Pocasset Manuf. Co.* 200.

Declaration whose allegations were held not to set forth facts sufficient for maintenance of action as action of tort for conversion, see CONVERSION, 1.

PLEADING, CRIMINAL.

Indictment.

In an indictment for perjury, containing one count charging the defendant with testifying falsely at the trial of a complaint for assaulting a certain person and throwing a stone in a public way in a town, and another count charging the defendant with testifying falsely at the trial of a complaint against the same person for hitting the person, alleged in the first count to have been assaulted, with a stone thrown at him, where there is no allegation that these are different descriptions of the same act, the two counts will be taken to charge separate offenses. *Commonwealth* v. *Hollander*, 73.

PLEDGE.

Of Mortgage.

A pledgee of a mortgage of real estate, regularly assigned to him, may foreclose the mortgage for a breach of condition, if he deems such action to be best for the interests of himself and of the pledgor, and may exercise a power of sale contained in the mortgage and purchase the property at such sale if under the terms of the mortgage an assignee of the mortgage has a right to do so, but after such a purchase he holds the property as trustee for the pledgor and subject to redemption by him on payment of the debt which the mortgage was pledged to secure. *Union Trust Co.* v. *Hasseltine*, 414.

POWER.

Construction of will with regard to whether power which was given to testator in lifetime by deed was executed in will, see DEVISE AND LEGACY, 7, 8.

PRACTICE, CIVIL.

Parties.

Demurrer to action upon contract in writing against one signer thereof only, sustained because, on interpretation of instrument, it was held to be a joint undertaking and therefore the other signers should have been joined as defendants, see CONTRACT, 4.

Plea in Abatement.

Petition to enforce mechanic's lien will not be abated because there is pending at same time action of contract for debt secured by the lien, see MECHANIC'S LIEN, 1.

Demurrer to "answer in abatement" to petition to enforce mechanic's lien

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sustained because allegations of answer did not set forth grounds for abatement, see MECHANIC'S LIEN, 2.

Concurrent Remedies.

Pendency of action of contract for collection of debt does not prevent maintenance of petition to enforce mechanic's lien therefor at same time, see MECHANIC'S LIEN, 1.

Amendment.

1. It is within the discretion of the judge before whom a case has been tried to refuse to allow the defendant to amend his answer after a verdict has been returned for the plaintiff by setting up the defendant's discharge in bankruptcy granted while the case was pending. *Hirsch* v. *Beard*, 569.
2. The declaration in an action of tort against an employer, brought by one describing himself as the administrator of the estate of an employee of the defendant, alleged in a first count that by reason of negligence on the part of the defendant the plaintiff's intestate was "mortally wounded and killed," in a second count that he "was greatly injured and died in consequence thereof," and in the third and fourth counts that he was riding in an elevator which fell "thereby inflicting great injury . . . in consequence of which injury he died." The notice which had been given to the defendant under R. L. c. 106, § 75, stated that the death was preceded by conscious suffering. Before the trial, the plaintiff moved to amend the writ and declaration so as clearly to set forth an action under R. L. c. 106, § 73, by the dependent next of kin of the deceased for death not preceded by conscious suffering. After a hearing, the motion was granted, the judge filing no memorandum. The defendant alleged an exception. *Held*, that on the record it must be assumed that, before allowing the amendment, the judge was satisfied that the cause of action intended by the plaintiff when the writ was issued was that set forth in the amendment; and that it could not be said as matter of law that the amendment introduced a cause of action not intended when the writ was issued. *Herlihy* v. *Little*, 284.

Amendments made in Superior Court in case appealed from police, district or municipal court or trial justice must be such, so far at least as they affect the question of jurisdiction, as could have been made in lower court, see SUPERIOR COURT, 1, 2.

Interrogatories.

3. In an action against a corporation operating a street railway for personal injuries caused by the derailment of a car of the defendant in which the plaintiff was a passenger, the plaintiff filed interrogatories under R. L. c. 173, § 61, addressed to the president of the defendant, containing the following question: "State whether or not the defendant company made an investigation as to the cause of said accident, and if your answer be 'Yes,' state what facts were discovered as a result of said investigation." The president answered as follows: "The defendant company investigated the accident referred to in the declaration in this case, but declines to state the result of its investigations, on the ground that in so doing it

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would disclose its evidence and the manner in which it proposes to prove its case." *Held*, that under R. L. c. 173, § 63, the answer was a proper one, and that a motion of the plaintiff that the defendant's president should be ordered to answer the interrogatory further should be denied. *Carroll* v. *Boston Elevated Railway*, 527.

Issues of Fact.

4. In certain actions to enforce the liability of registered stockholders under the companies act of Great Britain, St. 25 & 26 Vict. c. 89, the liability of the defendants depended on what the law of England was, and there were put in evidence an auditor's report and answers to interrogatories, oral testimony of some of the defendant's and particularly the oral testimony of an eminent English barrister who testified at length, discussing and expounding most if not all of the numerous English decisions bearing upon the questions at issue. All of these decisions were put in evidence as well as the act of Parliament in question, St. 25 & 26 Vict. c. 89. The evidence was such that a tribunal of fact could find upon the whole evidence, following the opinion of the expert, that there was no ground for charging the defendants under the law of England, and, on the other hand, the English decisions put in evidence would warrant a tribunal of fact in returning verdicts for the plaintiff, so that the counsel on both sides could make strong arguments in favor of their respective contentions. The facts to which the law of England was to be applied differed materially from those in any case decided by an English court. *Held*, that, in this state of the evidence, the question of fact as to what the law of England was must be left to the jury, and that it was error to order a verdict either for or against any of the defendants. *Electric Welding Co.* v. *Prince*, 386.

Jury not bound to believe testimony because it is uncontradicted, see EVIDENCE, 14, 15.

Where evidence at trial is conflicting, refusal to give ruling ordering verdict for defendant held to be justified, see *post*, 14.

Where there are in evidence, at trial in Superior Court on appeal from Land Court of issue framed there, not only report of his findings by judge of Land Court but also other evidence in support thereof, ruling that verdict be directed for appellant held rightly refused, see BOUNDARY.

Where, at trial of action for personal injuries resulting from negligence of defendant, defendant admits negligence and there is evidence of damage to plaintiff resulting therefrom, verdict nevertheless should not be ordered for plaintiff, since jury might not believe evidence as to damage, see NEGLIGENCE, 53.

Even by agreement of parties, this court has no authority to determine, from evidence submitted in report by judge of Superior Court or by single justice of Supreme Judicial Court under R. L. c. 173, § 105, question of fact as to what law of foreign country or State is on matter at issue, see *post*, 21.

Request of defendant at trial of action by employee against employer under

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R. L. c. 106, § 71, to recover for personal injuries, for ruling that, since there was uncontradicted evidence that accident to plaintiff was caused by negligent act of fellow servant, he could not recover, held to have been properly refused, since jury were not bound to believe such evidence, see EVIDENCE, 15.

Agreed Statement of Facts.

5. Where a case is tried upon an agreed statement of facts which contains no stipulation that the trial court may draw inferences of fact from the facts agreed upon, the plaintiff must fail unless among the facts contained in the agreed statement are included all the elements which the law requires to establish his claim. *Cunningham* v. *Connnecticut Fire Ins. Co.* 333.

Objection to Declaration at Trial.

6. At the trial of an action at law, in which no demurrer had been filed, the defendant before the jury had been empanelled asked the presiding judge to rule that upon the proof of all the allegations contained in the plaintiff's declaration the plaintiff would not be entitled to recover. The presiding judge refused to make the ruling, and this court, holding that the refusal was right because the declaration stated a good cause of action, found it unnecessary to decide whether the defendant properly could question for the first time the right of action stated in the pleadings after the case had been called for trial. *Bamford* v. *Boynton*, 560.

Conduct of Trial.

7. If a witness on his cross-examination gives an answer which is not strictly responsive to the question, but which is germane to the subject of the inquiry and is material and competent evidence, it is within the discretion of the presiding judge to refuse to strike out the answer as non-responsive. *Lewis* v. *Coupe*, 182.
8. The exclusion of a letter, written by a person who has testified as a witness for the opposing party, which is offered to show his bias against the party offering the letter in evidence, but which contains only by remote inference, if at all, any possible allusion to the party offering it in evidence, is a matter within the discretion of the presiding judge. *Carroll* v. *Boston Elevated Railway*, 527.
9. In an action against the proprietor of a foundry for breach of an agreement to buy and pay for five hundred tons of pig iron, it appeared that about eight and a half months after the contract was made the former proprietor of the foundry, who originally had been joined as a defendant, sold the foundry and all the business connected with it to the later proprietor who owned it at the time of the trial. During the trial the plaintiff, by leave of court, discontinued his action against the former proprietor and amended his declaration by alleging the transfer and declaring against the later proprietor alone. Before the amendment, the presiding judge, against the objection and exception of the defendant, had admitted *de bene* evidence of correspondence between the plaintiff and the former proprietor of the foundry before the time of the transfer, but, at the close of

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the evidence, the judge, at the defendant's request, excluded from the consideration of the jury all correspondence previous to the date of the transfer. *Held*, that, although, after the discontinuance of the action as against the former proprietor and the amendment of the declaration, the evidence became incompetent against the remaining defendant, yet, the jury having been instructed to disregard it, the exception taken at the time of its admission could not be insisted on, as the defendant failed to show that he had been prejudiced. *Moffat* v. *Davitt*, 452.

For rulings regarding conduct of trials in Probate Court, see PROBATE COURT, 1, 3; EVIDENCE, 2, 3.

Ruling on qualification of witness offered as expert, see EVIDENCE, 6.

It is proper for presiding judge to refuse to single out portion of evidence for comment in his charge, although comment requested may be correct, see *post*, 12.

Exercise by presiding judge of discretion in exclusion of evidence, offered in cross-examination of witness at trial of action by traveller on highway against one who ran automobile into plaintiff from behind on dark night, held not to have been improper, see EVIDENCE, 4.

Ordering Verdict.

Where at trial one issue is concerning foreign law bearing on liability of stockholders in foreign corporation, and evidence is introduced thereon warranting finding either way, verdict should not be ordered for either party, but question is for jury, see *ante*, 4.

Where, at trial of action for personal injuries resulting from negligence of defendant, defendant admits negligence and there is evidence of damage to plaintiff resulting therefrom, verdict nevertheless should not be ordered for plaintiff, since jury might not believe evidence as to damage, see NEGLIGENCE, 53.

Ruling of judge, presiding at trial in Superior Court on appeal from Land Court of issue framed there, refusing to order verdict for party against whom judge of Land Court made finding, held to have been correct, not only report of his findings by judge of Land Court but also other evidence in support of it having been introduced in evidence, see BOUNDARY.

Judge's Charge.

10. In determining whether or not an exception to a designated portion of a charge to a jury should be sustained, the charge should be considered as a whole, and, if as a whole it is legally correct and not likely to mislead the jury, the exception will be overruled although the portion objected to is open to deserved criticism. *Lockwood* v. *Boston Elevated Railway*, 537.

11. The provision of R. L. c. 173, § 80, that "the courts shall not charge juries with respect to matters of fact," does not make it improper for the presiding judge, in charging the jury in an action against a coal company for personal injuries from falling into a coal hole alleged to have been left open and unguarded by the servants of the defendant, upon the question whether a warning given to the plaintiff by the driver of the defendant's

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coal team, if given at all, was given too late, to use the illustration of a "scorcher" bicycle rider who said to a man just as he ran over him "Look out!" Whereupon the man said "For heaven's sake, are you coming back again?" *Picquett* v. *Wellington-Wild Coal Co.* 470.

Granting of motion for new trial on ground that verdict was "against the law" held proper where, although it appears from whole charge that judge had correct view of law, there was reason to fear that jury were misled by some of his statements, see *post*, 19.

Rulings and Instructions.

12. A presiding judge properly may refuse to single out a portion of the evidence for comment, although the comment requested may be a correct one. *Carroll* v. *Boston Elevated Railway*, 527.

13. It is proper for the judge presiding at a trial to refuse to grant a request for a ruling which deals with a particular phase or fragment of the testimony not decisive of the case. *Herlihy* v. *Little*, 284.

14. Where the evidence introduced at a trial is conflicting and the jury would find for the plaintiff if they believed the evidence relied on by the plaintiff and disbelieved that relied on by the defendant, a request to direct a verdict for the defendant must be refused. *Ibid.*

15. A refusal by a judge, before whom an action at law is being tried without a jury, to grant a request that the plaintiff is not entitled to recover on a certain count of the declaration, is equivalent to a finding that the plaintiff is entitled to recover on that count. *Maynard* v. *Royal Worcester Corset Co.* 1.

Request for ruling which omitted element necessary to make proposition correct held to have been refused rightly, see NEGLIGENCE, 31, 32.

Discretion of Judge.

In ruling on qualification of witness offered as expert, see EVIDENCE, 6.

Whether defendant shall be allowed to amend answer after verdict to set up discharge in bankruptcy granted while case pending, is within discretion of judge, see *ante*, 1.

Exclusion of letter, containing only by remote inference reference to party offering it for purpose of showing bias of witness who wrote it, is within discretion of presiding judge, see *ante*, 8.

Findings by Judge.

16. In an action of contract for salary alleged to be due under a special contract with the defendant for a period during which the plaintiff was idle after being discharged without cause, in deciding whether or not the plaintiff made a *bona fide* effort to secure other employment, a judge hearing the case without a jury is not precluded from using his own knowledge of practical affairs or applying his judicial sense to the consideration of a matter of such common occurrence as securing employment. *Maynard* v. *Royal Worcester Corset Co.* 1.

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Verdict.

Setting aside by judge of general verdict of jury sets aside their findings upon special questions submitted to them, see *post*, 20.

New Trial.

17. On a motion to set aside a verdict, alleging as reasons that it is against the law and against the evidence and the weight of the evidence, the trial judge may grant the motion and set aside the verdict "on the ground of misdirection in law," that being within the alleged reason that the verdict is "against the law." *Loveland* v. *Rand*, 142.

18. If after the granting of a motion to set aside a verdict and order a new trial, the party in whose favor the verdict was returned, files a motion for a rehearing, alleging only errors in the proceedings on the motion for a new trial, some of which might have been made the subject of exception in those proceedings under R. L. c. 173, § 106, it is within the discretion of the trial judge to entertain the motion or to decline to do so; but, if he sees fit to entertain the motion and to allow exceptions to his refusals to give certain rulings requested at the hearing upon it, his action gives the parties the same right to ask for rulings and to take exceptions to rulings made by him that they had when the same questions arose upon the original motion for a new trial. *Ibid.*

19. At the trial of an action where one of the defenses was that the defendant's signature to the instrument relied on by the plaintiff was procured by fraud, and another of the defenses was that the defendant did not sign the paper, the judge in the last sentence of his charge to the jury said, "If you find the defendant did sign this agreement, if you find that he did put his signature to a paper, and if you find that the paper is the paper that is alleged here, then the plaintiff has made out his case, and is entitled to damage," ignoring the other issue whether the defendant's signature was procured by fraud. In other parts of the charge instructions were given on the issue of fraud, but some of these were not very clear. On a motion for a new trial, the trial judge set aside a verdict for the plaintiff on the ground that there was a misdirection in law. *Held*, that, while there appeared to be little doubt that the judge had a correct view of the law in his own mind, there was reason to fear that the jury were misled by the statement quoted above and that the charge in its effect, as understood by the jury, was incorrect and misleading, that the trial judge, who had a much better opportunity than this court of forming a judgment on this question so decided, and there was no ground for finding error in his decision to grant a new trial. *Ibid.*

20. An order of a trial judge setting aside a verdict as against the evidence, upon a motion in writing to set it aside for that reason, is final, and is in no wise invalidated or affected by further ordering the setting aside of certain specific findings of the jury on material issues submitted to them, as by the setting aside of the general verdict the whole case is reopened for a new trial, and the specific findings become void, whether any reference is made to them in the order or not. *Welsh* v. *Milton Water Co.* 409.

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Reservation by Report.

21. By a report made in an action at law by a judge of the Superior Court or of the Supreme Judicial Court under R. L. c. 173, § 105, only questions of law can be presented for determination by the full court, and this court, even by the agreement of the parties in a case where the fact to be determined upon the evidence is what the law of a foreign country is, have no authority to decide what verdict should have been rendered by the jury. *Electric Welding Co.* v. *Prince*, 386.

Construction of terms of reservation of question whether writ of mandamus should issue so that reservation meant that question of discretion whether the writ should be granted had been decided by single justice in favor of petitioner, see BOARD OF HEALTH, 2.

Rehearing.

Granting of rehearing of motion for new trial is within discretion of judge; but, if rehearing is granted, parties have same rights to make requests for rulings and take exception to their being given or refused, as they had at original hearing, see *ante*, 18.

Appeal.

Appeal by plaintiff, in action of replevin in one count to recover five articles, from judgment for him for four of articles only, and for defendant for one, see REPLEVIN, 2, 3.

After appeal of civil action from police, district or municipal court or trial justice to Superior Court, case in appellate court is mere continuation of original case and amendments allowed must be such, so far at least as they affect question of jurisdiction, as could have been made in lower court, see SUPERIOR COURT, 1, 2.

Application for Rehearing before Full Court.

22. A judge of the Superior Court in the exercise of his discretion may order judgment to be entered in accordance with a rescript issued by this court, although an application for a rehearing on account of a supposed error of law in the decision of the case by the full court has been sent to the Chief Justice of this court and the receipt of it has been acknowledged with a statement that it will be considered by the justices at their next meeting for consultation, the time for which has not arrived. *Powers* v. *Sturtevant*, 519.

23. If, after the receipt of an application for a rehearing in a case which has been decided by this court, the justices do not recall the rescript or otherwise suggest a postponement of action by the lower court, the action of that court should be governed by the rule stated in Shannon *v.* Shannon, 10 Allen, 249, which leaves the question of postponing the entering of judgment for the purpose of affording the unsuccessful party an opportunity for a re-argument before this court to be determined by the trial judge in the exercise of his discretion, and his refusal of an application for such a postponement furnishes no ground for exception. *Ibid.*

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Exceptions.

24. In an action for personal injuries alleged to have been caused by the defendant's negligence, the exclusion of evidence offered by the plaintiff upon the question of damages is made immaterial by a verdict for the defendant on the issue of negligence. *Carroll* v. *Boston Elevated Railway*, 527.

25. No exception lies to the refusal of a judge presiding at a trial to grant a request for a ruling which correctly states a proposition of law applicable to the facts of the case, if in his charge to the jury he in substance states the proposition contained in the request, although in different words. *Cashman* v. *Proctor*, 272.

26. Where a bill of exceptions states an exception to the exclusion of a letter offered as evidence, but does not set forth either the letter or a description of its contents or the purpose for which it was offered, the exception cannot be sustained since there is nothing in the record to show that the excepting party was harmed by the exclusion of the evidence. *Deane* v. *American Glue Co.* 459.

27. At the trial of an action against a street railway company for personal injuries suffered by the plaintiff while he was a passenger on a car of the defendant, a material question in issue was, whether the car was moving when the plaintiff boarded it. A witness for the defendant testified in direct examination that the car had stopped at a crossing before the point where the plaintiff had boarded it and had not stopped again until after the accident, and he identified a statement which he had received in blank from the defendant "afterwards" with a request to fill it out and mail it to the defendant. In cross-examination he stated that he was reading a newspaper at the time of the accident and did not think he noticed whether the car stopped or not after the crossing designated. In redirect examination, "as bearing on the question as to how soon his attention" was called to the matter after the accident, the defendant asked "And when you received that blank . . . were you asked to state whether the car was moving or standing when" . . . [the sentence was not completed.] The question was excluded and the defendant excepted. *Held*, that the exception must be overruled. *Lockwood* v. *Boston Elevated Railway*, 537.

28. In an action for the price of jewelry alleged to have been sold and delivered under the terms of an order blank signed by the defendant, it appeared that the signature of the defendant to the order blank was procured by a salesman of the plaintiff, who exhibited samples of the jewelry named in the order blank, and the plaintiff testified that the jewelry delivered to the defendant was up to the samples furnished by the plaintiff to the salesman who dealt with the defendant. The defendant offered evidence to contradict this testimony which was admitted by the judge against the objection and subject to the exception of the plaintiff. The order blank signed by the defendant contained a provision called a "warranty and exchange obligation" clause, which terminated as follows: "The purchaser hereby waives all right to claim . . . that goods are not like sample . . . unless he has exhausted the terms of warranty and exchange." It was admitted that the defendant had not exhausted the terms of that

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clause. The plaintiff asked the judge to instruct the jury that by force of this clause the fact that the jewelry was not up to sample was of no consequence, and the judge gave this instruction. *Held*, that, when the plaintiff, as a part of his original case introduced in evidence his testimony that the jewelry delivered was up to the sample shown to the defendant by his agent, he must be taken to have been proceeding at that time on the ground that the jewelry was up to sample, waiving his rights under the clause of the contract above described, and therefore that the plaintiff's exception to the admission of the defendant's evidence in contradiction was not well taken, and did not become good when the plaintiff changed his mind and asked for the instruction under the clause of the contract described above. *Price* v. *Rosenberg*, 36.

Exception to portion of charge of judge will not be sustained, although portion objected to is objectionable, if on whole charge is correct and not misleading, see *ante*, 10.

Exception will not be sustained to admission *de bene* of evidence which was incompetent, if presiding judge instructs jury to disregard it, see *ante*, 9.

If rehearing of motion for new trial is granted by presiding judge, parties have same rights of exception to his rulings at rehearing that they had at original hearing, see *ante*, 18.

Costs.

Awarding of costs in action of replevin in one count to recover five articles, where judgment is ordered for plaintiff for four articles and for defendant for one, see REPLEVIN, 1.

Procedure in Replevin.

Proper procedure in action of replevin in one count to recover five articles, where judge in lower court finds plaintiff entitled to possession of four of the articles, and plaintiff appeals, see REPLEVIN, 1–3.

PRACTICE, CRIMINAL.

Nolle prosequi.

Attendance of defendant in criminal case at time of entry of *nolle prosequi* therein is not necessary, and promise of district attorney to make such entry at next term of court is tantamount to the making thereof, so far as completion of services of defendant's attorney rendered to his client are concerned, see CONTRACT, 20, 21.

Requests and Rulings.

1. At the trial of an indictment for perjury containing two counts, respectively charging the defendant with testifying falsely on two different issues at the trial of a complaint in a district court, a request of the defendant for an instruction to the jury, that a certain fact in regard to which the defendant testified in the district court was of no importance for their consideration and "was not material to the issue presented in either count" of the indictment, cannot be granted if the fact was material to the issue raised by one of the two counts. *Commonwealth* v. *Hollander*, 78.

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Various rulings and portions of charge to jury at trial of one indicted for selling book containing obscene, indecent and impure language were held to be correct, see OBSCENE LITERATURE, 1–4.

Separation of Jurors.

2. At the trial of a criminal case the jury retired to consider their verdict at about eleven o'clock in the morning. They all were taken to a midday dinner. At about seven o'clock in the evening the officer in charge of the jury asked them whether they cared for supper, and, upon being told that they did, made preparations accordingly. One juryman said that he did not feel well and did not care for supper and would stay and smoke. The other jurors were taken to supper by the officer and this juryman was left in the jury room, which was locked and remained locked until the rest of the jury returned. The jury deliberated all night, and did not reach a verdict until after breakfast the next morning, at about ten o'clock. When the jury were taken out to supper the court had adjourned, and therefore the matter of leaving the juror alone in the jury room was not brought to the attention of the judge at that time. The jury returned a verdict of guilty, and the defendant filed a motion for a new trial on the ground that the jury had been allowed to separate after the case had been submitted to them and before they had arrived at their verdict. The judge denied the motion, and in doing so found as matter of fact that the officer and the juror acted in good faith and that the reasons which the juror gave for not wanting to go to supper were true; that the juror remained locked in the jury room alone all the time the other jurors were absent; that he saw no one and spoke to no one; and that nothing occurred during their absence to influence his mind in arriving at a verdict. The judge also found that there was no talk among the other jurors at the supper table in regard to the case, and that, even if some of the jurors did talk about the case in going from and returning to the court house, what was said was of a casual and informal nature and could not reasonably be considered a part of the deliberations of the jury. He also found that, although the juror might have heard and might have been influenced by the remarks made by some of the jurors if he had been with them in going to and returning from supper, the matter was too unsubstantial to justify setting aside the verdict, and that the facts did not show a reasonable probability that the rights of the defendant had been violated. The judge ruled as matter of law that on the facts found by him the defendant was not entitled to a new trial, and denied the motion as a matter of discretion. *Held*, that it could not be said as matter of law that there was any error in the rulings or the findings of the judge. *Commonwealth* v. *Edgerton*, 818.

New Trial.

Denial of motion for new trial, based on affidavits as to jurors not being together at all meal times, held to have been warranted, see *ante*, 2.

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PROBATE COURT.

Jurisdiction.

Probate Court has power to give redress to one who is named in will as legatee, if other persons by conspiring together keep will from being offered for probate, and therefore no action at law can be maintained against such persons, see ACTIONABLE TORT.

Appeal.

It is proper for judge presiding at trial of issues regarding sanity of testator, framed on appeal from decree of Probate Court, to limit period of time, evidence as to acts and events within which bearing on issue will be admitted, see EVIDENCE, 2, 3.

What Parties may oppose Allowance of Will.

1. At the trial of an issue, framed on an appeal from a decree of the Probate Court disallowing a will, as to whether the alleged testator was of sound mind at the time of the execution of the will, there appeared as appellees, contesting the validity of the will, one who was next of kin to the testator, and also one who alleged that he was a creditor of the testator and that by agreement with the testator as such creditor he had been made a beneficiary in a former will of the testator. Without any objection on the part of the appellant, and with the concurrence of counsel for the next of kin, the active conduct of the case of both of the appellees was carried on by counsel for the creditor, he opening the case to the jury, calling all the witnesses, offering depositions which he had procured to be taken and cross-examining witnesses. At the close of the evidence, the appellants requested the presiding justice to rule in substance that upon all the evidence the creditor had no standing to oppose the allowance of the will, and that his rights would not be affected adversely by its allowance. The rulings requested were refused, the creditor's counsel was allowed to make the closing argument to the jury for the appellees, and the appellant alleged exceptions. *Held*, that the question whether the creditor had any standing to object to the allowance of the will was not open on the exceptions, since the jury were not to determine whether the will should be allowed, but solely to answer the question put to them with regard to the soundness of mind of the alleged testator. *Held*, also, that under the circumstances the presiding justice was right in allowing the counsel for the creditor to make the closing argument for the appellees. *Jenkins* v. *Weston*, 488.

Petition to revoke Decree allowing Will.

2. After the proof and allowance of a will, the widow of the testator filed a petition in the Probate Court, alleging that at the time when he signed the will her husband was of unsound mind, that the will was not legally executed, and that the executor who sought and procured its proof and allowance knew such facts and procured the proof and allowance by fraud.

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The Probate Court dismissed the petition, and it was heard on appeal by a single justice of this court, who found that the petitioner had opposed the allowance of the will in the Probate Court, that thereafter she had appealed from such allowance and that, after the entry of the appeal in this court, a waiver of appeal had been filed, which was signed by her personally and the purport of which she understood when she signed it; that after the allowance of the will she had not waived its provisions, but had received payments of sums directed by its provisions to be paid to her, and that there was no fraudulent concealment by the executor as alleged. The single justice, on the facts found by him, dismissed the petition. *Held*, that the dismissal of the petition was proper. *Boardman* v. *Hesseltine*, 495.

8. At a hearing before a single justice of an appeal from a decree of the Probate Court dismissing a petition for the revocation of a previous decree of that court allowing a will, where the petition which is being heard on appeal alleges that the previous decree was procured by fraud of the person named as executor in the will through his concealing from the court the facts that the alleged testator was of unsound mind when he executed the instrument and that it was not legally executed, it is proper for the justice to refuse to hear evidence as to whether or not the alleged testator was of sound mind when he executed the instrument except in connection with evidence which might tend to show knowledge on the part of the executor of the unsoundness of mind of the testator when he executed the will, or fraud of the executor in procuring the allowance of the will, since the issues as to the execution of the will and the soundness of mind of the testator, having been fully tried and determined, could not be reopened by such a petition merely on the ground that they were not decided in accordance with the facts. *Ibid.*

Deposit by Judge of Unclaimed Funds.

4. Where it was ordered by the Probate Court that the funds of the estate of a deceased person should be paid to one of the next of kin, and, upon such next of kin refusing to receive them, the funds were deposited under Pub. Sts. c. 144, § 16, now R. L. c. 150, § 23, by the administrator in a bank in the name of the judge of probate for the benefit of such next of kin, and the bank agreed in writing to allow interest on the sum at the annual rate of two and one half per cent and on demand to repay the principal sum with interest to the judge or his assigns, but reserved the right, upon giving ten days' notice, to reduce the rate of interest or to discontinue the payment of interest or to pay off the principal, it was *held*, that such agreement of the bank was made with the judge of probate, who was entitled to the ten days' notice before the rate of interest was changed or the interest was discontinued, and neither a letter sent by the bank on May 31 to the next of kin for whose benefit the deposit was made containing a statement that interest would be discontinued after June 1, nor a letter of the bank to the register of probate on June 14 stating a claim by the bank that the letter of May 31 to the next of kin caused the stipulated

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interest to cease accumulating, constituted the required notice to the judge of probate or was effectual at any time to stop the accumulation of interest. *Cole* v. *New England Trust Co.* 594.

PROXIMATE CAUSE.

See NEGLIGENCE, 27, 57.

RAILROAD.

R. L. c. 111, § 188, requiring a railroad corporation to cause a bell to be rung or a steam whistle to be sounded continuously for eighty rods on a locomotive engine approaching a grade crossing of a highway, does not apply to an engine with a freight car attached to it backing down from a freight house to be recoupled to a freight train which has stopped after substantially passing the crossing, leaving the end of the last car still extending four feet over it, there being no intention nor attempt to run the train again over the crossing. *White* v. *New York, New Haven, & Hartford Railroad*, 441.

Boston Elevated Railway Company does not operate "railroad" within meaning of R. L. c. 106, § 71, cl. 3, see NEGLIGENCE, 17, 18.

Liability of railroad companies as employers for injuries to employees, see NEGLIGENCE, 16–20, 37.

Action against railroad corporation for causing conscious suffering and death of plaintiff's intestate, who was struck by end of freight car when engine had backed down to recouple to freight train near crossing, see NEGLIGENCE, 59.

REAL ACTION.

Where the owner of certain land executed and delivered a mortgage of it and died intestate, and the mortgagee made a fraudulent alteration in the mortgage deed so that land not included in the deed as originally executed was included in the description in the deed as altered, and the land as described in the altered deed was sold at a foreclosure sale to a stranger who entered into possession of it, an heir of the mortgagor should enforce his right in the land so sold by writ of entry and not by a bill in equity. *Marvel* v. *Cobb*, 293.

Petition to vacate judgment in real action dismissed because on facts judgment was warranted, see JUDGMENT.

RECEIVER.

1. A decree in a suit in equity brought against a foreign corporation by a creditor who also has been appointed receiver of the corporation by a court of the State of its incorporation, which appoints such creditor ancillary receiver to take possession of and collect accounts owing to the corporation in this Commonwealth and attached by creditors here, should direct the ancillary receiver so appointed not to transmit the Massachusetts assets to himself as receiver in the other State until provision has been made for attaching creditors here. *Thornley* v. *J. C. Walsh Co.* 179.

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Receiver (*continued*).

2. A bill in equity, praying for the appointment of a receiver of an insolvent corporation incorporated in another State, to be ancillary to a receiver appointed in such other State and to collect assets here and, after the rights of creditors attaching here have been safeguarded properly, to turn such assets over to the domiciliary receiver, may be maintained, although the corporation never had complied with St. 1903, c. 437, § 58, by appointing the commissioner of corporations to act as its attorney for receipt of service, and although the creditor petitioning here is the same person who on his own petition as a creditor was appointed domiciliary receiver and at that time was the attorney of the corporation, and made the application at the solicitation and with the consent of the corporation. *Thornley* v. *J. C. Walsh Co.* 179.

REGISTER OF PROBATE.

Register of probate is not agent of judge to receive notices with regard to deposit in bank under R. L. c. 150, § 23, nor is there any presumption of fact that he will deliver such notice to judge, see AGENCY, 1; EVIDENCE, 1; PROBATE COURT, 4.

REGISTRATION IN EMBALMING.

Rule of board of registration in embalming restricting granting of permits for removal, burial or disinterment of dead bodies to persons who are registered embalmers is in violation of constitutional right of every one to pursue any proper vocation to obtain a livelihood, and, if St. 1905, c. 473, § 6, undertook to give power to board to make such rule, it would be unconstitutional as assuming to delegate legislative authority, see CONSTITUTIONAL LAW, 2, 5, 6.

RELEASE.

Action by inexperienced foreigner to recover money paid on margins on wagering contracts, in which defendant relied upon release given by plaintiff, which plaintiff contended was procured by fraud, see DECEIT, 3.

REPLEVIN.

1. In an action of replevin for five articles, where the declaration contains but a single count, if it appears that the plaintiff owns four of the articles and is entitled to their possession, but that he does not own the fifth article and is not entitled to its possession, two judgments must be entered, as if there were two separate counts, one in favor of the plaintiff for four of the articles, and the other for the defendant directing a return of the fifth article, and each judgment may include costs. *Cronin* v. *Barry*, 563.
2. If in an action of replevin brought in a police court for a bitch and four pups, the court enters a judgment for the defendant directing the return of one of the pups, describing it, and makes no order as to the bitch and the other three pups, an appeal by the plaintiff to the Superior Court from the judgment carries up the whole case, and should be interpreted as an appeal not only from the judgment for the return of the pup described but also from the failure to enter a decree in the proper form as to the other four dogs. *Ibid.*

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3. In an action of replevin brought in a police court for a bitch and four pups, the court entered a judgment directing the return of one of the pups, describing it, but failed to make any order as to the bitch and the other three pups. The plaintiff appealed to the Superior Court from the decree and claimed a trial by jury. The record of the Superior Court showed simply that in answer to the question "Did the pup in question belong to the plaintiff?" the jury said "No," and there was no record of any general verdict either for the plaintiff or the defendant or of any finding of the jury in regard to the bitch and the other three pups. The record contained a "Finding" as follows: "Judgment is to be entered for the plaintiff for one Boston terrier bitch and three pups, with costs; judgment for defendant for return of one bitch pup with costs." From the judgment entered in accordance with this finding the defendant appealed, contending that the question of the title to the Boston terrier bitch and the three pups decided to belong to the plaintiff was not before the Superior Court and that the judge of that court erred in undertaking to include them in the judgment. *Held*, that the appeal from the judgment of the police court brought up the whole case to the Superior Court, and that it could be assumed from the order of the judge of that court entitled "Finding" that, apart from the single issue left to the jury, the parties were content to submit all other questions to the judge rather than to the jury, and that upon such submission the judge, either upon evidence or upon statements of the parties, found that the four dogs other than the one whose ownership was passed upon by the jury were the property of the plaintiff, and, having so found, ordered judgment for the plaintiff on such findings and for the defendant on the finding of the jury; and therefore that the judgment was supported by the record and should be affirmed. *Cronin* v. *Barry*, 563.

Action of replevin by vendor under contract of conditional sale held to be barred by former action by him for balance due on contract, such action being election to treat sale as absolute, see SALE, 2.

RES IPSA LOQUITUR.

See NEGLIGENCE, 34, 51.

REVIEW.

Judgment for plaintiff in action against attorney at law to recover balance of deposit alleged to be due plaintiff on completion of attorney's services, held, on review, to have been warranted on evidence, see CONTRACT, 21.

SALE.

Implied Terms of.

1. An unqualified sale of goods by the person having possession of them includes an implied warranty of title or of the right to make the sale, and, if at the time of the sale the goods belonged to another who had not au-

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thorized their sale, the buyer may surrender the goods to their owner and recover the amount of the purchase money from the seller. *Hartley* v. *Rotman*, 372.

Conditional.

2. The commencement of an action of contract for a balance due to the plaintiff under a contract of conditional sale of personal property, which provided that the title to the property should not pass to the purchaser until the purchase price had been paid in full, and the arrest of the defendant on mesne process under R. L. c. 168, § 1, in such action on an affidavit that he is about to leave the Commonwealth, constitute an election to treat the sale as an absolute one, and thereafter, although the action of contract is not entered and the defendant is discharged from custody, the plaintiff cannot maintain replevin for the property described in the contract against a third person who has it in his possession. *Frisch* v. *Wells*, 429.

Delivery.

Contract with structural company at Everett for sale to it of steel beams containing following: "Terms: Cash . . . against invoice and delivery to . . . company at Boston," held not to require delivery at Everett, but to be performed by delivery of beams on wharf in Boston and notifying company at Everett of their arrival, see CONTRACT, 5.

Caveat Emptor.

Representation by seller that mortgage he is selling is first mortgage is not mere seller's talk, and may form basis of action for deceit if it is false, see DECEIT, 1, 2.

Validity.

Action for purchase price of certain goods alleged to have been sold by plaintiff to defendant in which defense was that written order therefor was procured from defendant and sale made to him by means of fraud of plaintiff's agent, see CONTRACT, 11–13.

SALES OF MERCHANDISE IN BULK.

An insolvent mercantile corporation, the stock in trade in whose store was subject to two mortgages, the second of which covered not only the property then in the store but also "all other goods and supplies . . . hereafter contained in" the store, sold its stock in trade in bulk and not in the usual course of trade to one with whom it agreed that out of the purchase price it would at once pay the amounts due on the mortgages, and the purchaser paid to the corporation $1,725 in two checks, one for $1,500, the amount due on the mortgages, and the other for $225. The corporation at once indorsed and delivered the $1,500 check to the mortgagee, who forthwith discharged the first mortgage and assigned the second and the note which it secured to the purchaser, who immediately took possession of all of the stock in trade. Both the corporation and the purchaser acted in good faith and with no actual intent to defraud the corporation's creditors. None of the requirements of St. 1903, c. 415, regarding sales

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of merchandise in bulk, were complied with. Thereafter the corporation was adjudged bankrupt and a trustee was appointed, who sought by a bill in equity to gain possession of the stock in trade formerly of the corporation. The trustee had not offered, and there was no offer in the bill, to pay to the purchaser what he had paid on the mortgages. *Held*, that the purchaser, having acted in good faith, was subrogated to the rights of the mortgagee, and was not prevented from enforcing the rights thus obtained by the constructive fraud which, according to St. 1903, c. 415, he had committed; and that therefore the bill must be dismissed. *Adams* v. *Young*, 588.

SET-OFF.

In action for purchase price of goods sold to defendant by one who was agent of plaintiff, but whose agency was undisclosed to defendant, defendant may set off liquidated claim against agent, see AGENCY, 8.

SEWER COMMISSIONERS.

Removal by mayor of Taunton of sewer commissioners for cause, see TAUNTON.

SLANDER.

See LIBEL AND SLANDER.

SMALL LOANS ACT.

Constitutionality of St. 1908, c. 605, § 7, regarding assignments of or orders for wages to be earned in future, see CONSTITUTIONAL LAW, 1, 3, 4, 7.

STATUTE.

Construction.

Statutes, which are alleged to be inconsistent with each other in whole or in part, must be construed so as to give reasonable effect to all, unless some positive repugnancy appears. *Brooks* v. *Fitchburg & Leominster Street Railway*, 8.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See pp. 731–735.

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STONY BROOK.

Action of tort by riparian owner on former course of Stony Brook cannot be maintained against city of Boston to recover damages resulting from diversion of waters of brook, although there was no mention either of his name or of his land or of his rights in instrument of taking, see DAMAGES, 3, 4.

STREET RAILWAY.

1. The intention of one boarding an electric street car, to be transported through several towns to a city, which is not communicated to the company operating the car, the passenger paying a fare in each town, does not place the company under obligation to transport the passenger to his intended destination. *Sullivan* v. *Old Colony Street Railway*, 303.

2. One, who has been accepted as a passenger upon an open electric car in a crowded street in a city and who is passing from the running board to a seat, has a right to assume that, while he is doing so, the car will not be started until all danger of its running so near to teams in the street as to injure him has passed. *Lockwood* v. *Boston Elevated Railway*, 587.

3. The principle, applicable to railroad companies whose trains stop only at fixed stations, that they hold themselves out as carriers offering transportation only to such persons as present themselves in the usual way at stations, has not been applied to street railways whose operating companies have not promulgated a rule that passengers will not be taken on except at designated places. *Ibid.*

Actions against street railway companies for injuries due to negligence of them or of their agents, servants or employees, see NEGLIGENCE, 6, 7, 29, 47–58, 64.

Remedy for death given by St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392, is exclusive and R. L. c. 171, § 2, as amended by St. 1907, c. 375, does not apply to death caused by negligence of street railway corporation or its agents or servants, see NEGLIGENCE, 67.

Case where street railway company was held not to be liable for injury to passenger resulting from derailment of car caused by defect in switch, it appearing that company had exercised as much care in examination of switch as was consistent with practical operation of railway, although it also appeared that with greater care defect would have been avoided, see NEGLIGENCE, 50.

SUBROGATION.

Principles of subrogation applied to case where, in purchasing merchandise in bulk, purchaser paid off mortgages thereon and thereby became entitled to be subrogated to rights of mortgagor as against creditor seeking to set aside sale as violation of St. 1903, c. 415, see SALES OF MERCHANDISE IN BULK.

SUNDAY.

See LORD'S DAY.

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SUPERIOR COURT.

1. The Superior Court has no power, after a civil action has been entered therein on appeal from a district court, the jurisdiction in which does not extend to actions where the *ad damnum* exceeds $1,000, to allow an amendment to the writ increasing the *ad damnum* from $1,000 to $2,000. *Hall* v. *Hall*, 194.

2. *It seems*, that, on an appeal of a civil action from a police, district or municipal court or trial justice to the Superior Court, the case in the appellate court is a mere continuation of the original case and, although amendments may be allowed in the latter court under R. L. c. 173, §§ 23, 97, they must be such, so far at least as they affect the question of jurisdiction, as could have been made in the court whose judgment is appealed from. *Ibid.*

Judge of Superior Court may order that judgment in case there pending be entered in accordance with rescript from Supreme Judicial Court although application for rehearing of case by latter court has been made and receipt of application has been acknowledged, if the rescript has not been recalled, see PRACTICE, CIVIL, 22, 23.

SUPREME JUDICIAL COURT.

Acknowledgment by Supreme Judicial Court of receipt of application for rehearing of exceptions after issuance of rescript does not prevent entry of judgment in case if rescript is not recalled, see PRACTICE, CIVIL, 22, 23.

TAKING.

Action of tort against city of Boston by riparian owner along former course of Stony Brook to recover for diversion of water, see DAMAGES, 3, 4.

Petition for assessment of damages from taking of private way for abolition of grade crossing, see DAMAGES, 5, 6.

TAUNTON.

Section 3 of St. 1904, c. 384, an act relative to sewerage expenses, assessments and charges, and to the powers of the sewer commissioners in the city of Taunton, requires assessments to be made for completed sewers or sections of sewers upon the estates benefited thereby, as soon as in each case this reasonably can be done, so that the expense of construction may be borne in proper proportion by the general taxpayers and those who derive special benefits from the construction, and, if the sewer commissioners neglect to take any action in the matter and their delay becomes unreasonable, the mayor of Taunton may remove them under the power given to him by St. 1895, c. 219, § 4, re-enacted in St. 1904, c. 384, § 9, which makes the sewer commissioners of the city of Taunton "subject to removal by the mayor for cause." *Dunn* v. *Mayor of Taunton*, 252.

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TAX.

Exemption.

Money loaned on mortgage upon real estate dedicated to use as cemetery is not exempt from taxation, see *post*, 2.

Assessment.

1. Where the legal title to land is held by a trustee under a will, a tax thereon should be assessed to such trustee. *Dunham* v. *Lowell*, 468.
2. Money loaned on a mortgage upon real estate dedicated to use as a cemetery is not a loan upon a "mortgage of real estate, taxable as real estate" under R. L. c. 12, § 16, since the cemetery is exempt from taxation; but such a loan is taxable as personal property under R. L. c. 12, § 4, cl. 2. *Sweetser* v. *Manning*, 378.
3. Under St. 1903, c. 437, § 71, which provides that every foreign corporation which is subject to the provisions of that act "shall be subject to taxation upon all real estate, machinery and merchandise owned by it and situated in this Commonwealth by the city or town in which such property is situated," and providing further that "the taxes authorized by the provisions of this section shall be assessed, collected and paid in accordance with the provisions of chapters twelve and thirteen of the Revised Laws," machinery and merchandise belonging to a foreign corporation which is subject to the provisions of the act are subject to local taxation in the city or town where they are situated in the same way as the real estate belonging to such corporation, although the corporation does not hire or occupy a manufactory, store or shop in the city or town and therefore its machinery and merchandise are not taxable there under clause 1 of R. L. c. 12, § 23. This clause is inapplicable, the reference in St. 1903, c. 437, § 71, to the provisions of chapters twelve and thirteen of the Revised Laws being merely for the purpose of directing how the tax that is authorized shall be assessed and collected. *Hilliard* v. *Fells Ice Co.* 331.
4. A Rhode Island corporation erected in Massachusetts a dam across the Blackstone River and constructed in connection therewith, upon land owned by it, canals, ponds and trenches in the town of Blackstone, but, without making any application of the water power in this Commonwealth carried the water in a trench with a slight fall into Rhode Island, where it was used in a power house to generate electricity with which to run a mill in that State. This was the most valuable use to which the property in Blackstone could be put. The assessors of Blackstone taxed such of the property of the corporation as was in that town, including the dam, the pond, the canals and the trench, in reference to its value as a means of furnishing power at the corporation's power house in Rhode Island, and the corporation petitioned to have the tax abated. *Held*, that it would have been improper to tax the value of the use of the power in Rhode Island separately as water power existing and applied there, but that the land owned by the corporation in Blackstone should be taxed there with all its elements of value, so much of the value of the water power in Rhode

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Island as was imputable to the real estate in Blackstone being considered, as well as the uses to which the power could be put in Blackstone. *Blackstone Manuf. Co.* v. *Blackstone*, 82.

For Betterments.

Unreasonable delay of sewer commissioners of Taunton in assessing betterments for sewer construction held to be cause for removal of commissioners by mayor under St. 1895, c. 219, § 4, and St. 1904, c. 384, §§ 3, 9, see TAUNTON.

Abatement.

5. A list of a taxpayer's estate liable to taxation, intended in good faith to be filed in accordance with R. L. c. 12, § 41, entitles the taxpayer to be heard upon a question of abatement under § 74, although the list contains unintentional omissions and inaccuracies. *Blackstone Manuf. Co.* v. *Blackstone*, 82.

6. One, who purchased and received a conveyance of land after May 1, and thereupon applied to those, who had assessed a tax to the owner of the land on May 1, to abate the tax, is not a person aggrieved by the assessment and cannot appeal to the Superior Court under R. L. c. 12, § 78, from a refusal of the assessors to grant the abatement. *Dunham* v. *Lowell*, 468.

Payment.

Payment to city, whose collector had in its behalf bid in certain land at tax sales for collection of taxes of successive years, of the amount of taxes and other charges due thereon by one who at a subsequent sale purchased the land releases land from lien of prior taxes, see CONTRACT, 15.

Collection.

7. As between the authority assessing a tax to the owner of land and the person to whom the tax is assessed, such person and not the land is primarily liable, the lien on the land being merely security of which the collector of the tax may avail himself in case of a default on the part of the person assessed. *Dunham* v. *Lowell*, 468.

Sale.

Purchaser of real estate in city at tax sale under St. 1888, c. 390, § 40, becomes owner thereof and entitled to redeem from former like sales, and, upon his paying to city, which had itself bid in land at prior sales, amount of taxes and other charges and receiving deed from city, the land becomes released from the prior taxes, see *post*, 8; CONTRACT, 15.

Redemption.

8. One who purchased real estate at a sale under St. 1888, c. 390, § 40, now R. L. c. 13, § 41, for the collection of a tax due to a city, thus became an "owner" of the real estate and entitled under St. 1888, c. 390, § 57, now R. L. c. 13, § 58, to redeem it from taxes assessed in years previous to the

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TAX (*continued*).

time when he became such purchaser, at sales for the collection of which the city, under St. 1888, c. 390, § 48, had become the purchaser. *Rogers* v. *Lynn*, 354.

Application of above principle resulting in defeat of action by one who, having so purchased, paid city amount of prior taxes and then sought to recover back amount so paid, see CONTRACT, 15.

TOWNS.

See MUNICIPAL CORPORATIONS.

TREE WARDEN.

1. Under R. L. c. 51, § 10, a tree warden has no right to cut down trees or to cut off parts of trees standing on private land outside the boundary lines of a street. *Commonwealth* v. *Byard*, 175.
2. At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, an instruction to the jury, stating in substance that a manifestly injurious act, done wilfully in reckless disregard of the rights of others, is done "wantonly" within the meaning of the statute, is correct. *Ibid.*
3. At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, the judge instructed the jury that if the defendant, acting as a reasonable man was justified in believing and honestly believed that he had the authority which he exercised he was not guilty, but that, if they found that, had the defendant taken any proper precaution to learn of his rights and duties as a tree warden, he would not have acted as he did, and if they found that he was grossly negligent in the performance of his duties as tree warden, they might find that he acted wantonly. *Held*, that the instruction was correct in substance. *Ibid.*
4. At the trial of an indictment against a tree warden under R. L. c. 208, § 100, as amended by St. 1902, c. 544, § 30, for wilfully, maliciously or wantonly injuring a tree standing for a useful purpose on the land of another, it appeared that the defendant was asked to cut off a part of a cherry tree by a person who had obtained a permit to move a building through the street, but that the building he undertook to move was longer and wider than the building described in the permit, so that its removal was not lawful, that its width was so great that it could not be taken through the street without cutting off branches and a part of the trunk of the cherry tree, that the owner of the tree refused to permit this to be done, and that the defendant, assuming to act under his authority as tree warden, did it against her protest. The defendant admitted on cross-examination that he had not at any time taken any steps to inform himself as to his powers, duties and authority as tree warden, except that he asked the mayor what he should do and was told to lop off trees in the highway which would

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obstruct carriages or the apparatus of the fire department, that he never had read any of the statutes or other sources of information concerning his powers and duties, except that he looked once or twice in a book sent to him by the State forester, that he had not seen anything in that book concerning his duties in such a case as this, that after he was asked to cut off the parts of the cherry tree he took no steps to inform himself as to his powers, duties or authority, that he did not attempt to ascertain what the permit was or whether the building was of the dimensions given in the permit, that he made no inquiry of the mayor or the city clerk, and did not consult the city solicitor, although he knew that he had a right to ask the city solicitor about it. It also appeared that he began the cutting without saying anything to the owner of the tree and that, although the evening before the cutting he saw the husband of the owner and talked with him after he had viewed the premises and had made up his mind to cut the tree, he said nothing to the husband about it. There was testimony as to the way in which the tree was cut and as to the defendant's having said that he was doing the mover of the house a favor. *Held*, that there was evidence warranting a finding that the defendant in cutting the tree acted wantonly, and justifying the jury in returning a verdict of guilty. *Commonwealth* v. *Byard*, 175.

TRESPASS.

1. A town is not liable for acts of trespass committed by the persons who are its selectmen and the persons who are its water commissioners in attempting to construct a street and to dig a trench for a water main in a private way which the town had undertaken to lay out as a public street by a vote which was illegal and void. *Pinkerton* v. *Randolph*, 24.
2. If the persons who are the selectmen of a town commit acts of trespass on the land of a private person under the supposed authority of a vote of the town which is illegal and void, they are liable to the landowner for the damage caused to his property, and, being joint trespassers, each of them is liable for the whole damage. The same rule is applicable to similar acts committed without authority by the persons who are the water commissioners of a town. *Ibid.*
3. The owner of land abutting on a private way, who also owns the fee of the land to the centre of the way and maintains trees and shrubbery on the part of the way of which he owns the fee, although his right to maintain them there is subject to the right of the other abutters on the way to have them removed as obstructing their right of passage, is entitled to damages against a trespasser who removes the trees and shrubbery for interference with his qualified right. The trespasser can show in reduction of damages that the right which he invaded was a qualified and not an absolute one, but, if the removal of the trees and shrubs diminished the value of his property, the landowner is entitled to more than nominal damages, and in estimating his damages it is proper to consider whether and to what extent the other abutters would be likely to insist upon their right of way under the circumstances shown. *Ibid.*

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TRUST.

What constitutes.

Pledgee of mortgage of real estate may foreclose it for breach of condition, but, if he buys in property at foreclosure sale, he holds it as trustee for pledgor and subject to redemption by him, see PLEDGE.

Bill in equity for accounting, brought by one of members of copartnership against person to whom he had paid certain money of partnership and assigned certain property of his own, both to be used for benefit of firm, held to have been brought properly by plaintiff alone, his agreement with defendant having been made by him as trustee for firm, see EQUITY PLEADING AND PRACTICE, 2.

Construction.

Land was conveyed by deed to a trustee "to pay over to" his father and mother, "during their joint lives and then to the survivor, during the life of the survivor, the rents and profits, or at their —— allow them to occupy said estate and at the decease of the said survivor convey said premises to their heirs at law." The trustee died in 1874, leaving his father as his only heir at law. The trustee's mother died in 1885, and his father married again and died in 1907. There was no issue of the second marriage. Children and grandchildren of the first marriage petitioned to have the title of the land registered, and the second wife of the trustee's father contended that the words "their heirs" in the deed should be construed to mean "his or her heirs" and that she was entitled to an equitable interest as the widow of the trustee's father. The Land Court ruled that the respondent had no equitable interest in the premises. *Held*, that the ruling of the Land Court was correct, since the words "their heirs at law" meant the heirs of both the trustee's father and mother, and not of the survivor of them. *Crandall* v. *Ahern*, 77.

Public Charitable Trusts.

Gift in trust which constitutes public charity but is for specific purpose is not to be administered *cy pres* upon purpose becoming impossible of execution, see CHARITY, 1.

Trust in will held to be for public charity for general charitable purposes, which would be administered *cy pres*, since its administration in precise way stated in will was impossible, see CHARITY, 2.

Where instrument creating trust by gift to city for public charity does not provide for such matters, Legislature has power to control city in administration of charity by prescribing who shall be appointed officers and agents for that purpose, see CHARITY, 3.

Application of above principle to case of Burbank Hospital in Fitchburg, see CHARITY, 4.

Alienability of Interests of Beneficiary.

Interest of beneficiary in income from real estate placed in hands of trustee "the net income . . . to pay" to him "during his life, or to permit him

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to occupy and enjoy the use of said property in common with his brothers as he may prefer," can be reached by suit in equity by creditor, so long as beneficiary does not elect to occupy the estate; but if he does so elect, his interest cannot be reached, for right of occupancy is personal and therefore inalienable, see DEVISE AND LEGACY, 4.

Recording of Assignment by Beneficiary.

Assignment of beneficiary's share of proceeds of sale of real estate held in trust for his benefit does not need to be recorded, and is valid without notice to any persons except parties to it, see ASSIGNMENT.

Wife of Trustee has no Dower in Trust Property.

Where legal title to land is held by husband in trust for others, it does not descend to his wife as one of his statutory heirs, see HUSBAND AND WIFE.

UNDERTAKER.

Writ of mandamus issued to compel board of health of Cambridge to grant license as undertaker to one who, although he was not licensed as embalmer by board of registration in embalming, was shown in other respects to be qualified, see BOARD OF HEALTH, 1, 2.

UNLAWFUL INTERFERENCE.

A building contractor can maintain a suit in equity to enjoin the members of a labor union, who are engaged in a lawful strike for higher wages and shorter hours of work, from causing those of his day laborers who are members of the union to leave his employ by threatening to impose fines upon them under a by-law of the union. Following Martell *v.* White, 185 Mass. 255. SHELDON, J. & KNOWLTON, C. J., dissenting, on the ground that the fining of the members of a union, under a by-law previously adopted, for refusing to join in a justifiable strike is lawful and properly may be resorted to in trying to maintain the strike. Distinguishing the point actually decided in Martell *v.* White. LORING, J., concurring in the decision of the majority of the court, on the ground that the present case cannot be distinguished from Martell *v.* White and that, although the doctrine of that case is not to be extended, the purposes of justice do not require that that case should be overruled as to the point that the use of threats of fines to exert coercion is illegal. *L. D. Willcutt & Sons Co.* v. *Driscoll*, 110.

VERDICT.

See PRACTICE, CIVIL, 20.

VOLUNTARY ASSOCIATION.

1. The power of a majority of the members of a voluntary unincorporated society to control the rights or the action of the minority of the members

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is derived from and is dependent upon the provisions of the constitution and by-laws of the society. *Hill* v. *Raukan Aarre*, 438.

2. A voluntary unincorporated society had in its by-laws the following provision: "If several motions are made regarding the same question and no unanimous decision can be obtained, said question will be voted on, and the wish of the majority shall prevail, except in the purchase or the sale of real estate, in which case two thirds majority must be the settling vote." The society owned an interest in certain real estate. At a meeting of its members, a majority of the members present voted to enter into union with another society, and at a subsequent meeting, by more than a two thirds vote, voted to transfer the society's real estate to such other organization. A minority voted against both propositions and brought a bill in equity to enjoin the carrying out of the votes. The case was referred to a master, in whose report there was no finding as to the purpose for which the plaintiff's society was organized. *Held*, that, in the absence of any statement as to the purpose for which the society was organized, the by-law above quoted did not authorize the action of the majority of the members objected to by the plaintiffs. *Ibid.*

WAGERING CONTRACTS.

Action by inexperienced foreigner to recover money paid as margins on wagering contracts, in which defendant relied upon release given by plaintiff which plaintiff contended was procured by fraud, see DECEIT, 3.

Contract providing for purchase by one party from the other of shares of capital stock in corporation to be organized, and for guaranteeing by other parties to contract of payment of purchase price, is not violation of R. L. c. 74, § 7, see CONTRACT, 14.

WAGES.

Constitutionality of St. 1908, c. 605, § 7, regarding assignments of or orders for wages to be earned in future, see CONSTITUTIONAL LAW, 1, 3, 4, 7.

WATER RIGHTS.

Discussion by KNOWLTON, C. J., of the development and the present condition of the law in this Commonwealth with regard to mill privileges. *Blackstone Manuf. Co.* v. *Blackstone*, 82.

Question of taxation of value of water power existing in Massachusetts and applied to machinery in Rhode Island, see TAX, 4.

WAY.

Public.

Continuance or discontinuance.

1. Every part of a public way once duly laid out continues to be such until legally discontinued. *Bliss* v. *Attleborough*, 227.

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2. Under the provision of R. L. c. 111, § 152, (St. 1906, c. 463, Part I. § 36,) concerning the abolition of grade crossings, that "The commission shall specify what portion, if any, of an existing public or private way shall be discontinued, the grades for the railroad and the way, the general method of construction and what land or other property it considers necessary to be taken," if a specification of a discontinuance of a portion of a public way under this statute can be found to have been made by implication, which is at least doubtful, a specification, in a report of the commission confirmed by a decree of the Superior Court, that the grade of a certain street shall be changed so that it may be carried under the railroad, that the street shall be graded to a width named and that suitable curbstones, gutters and sidewalks shall be built, following in the report specifications for the grading of some streets and for the discontinuance of parts of others, is not a discontinuance of such portion of the way as lies outside the grade line established by the commissioner's report, and such portion, left at its old grade, still remains a part of the highway subject to the public easement, especially where in taking a parcel from the owner of the adjoining land, whose ownership extends to the middle line of the street, the commissioners describe the parcel as bounded by the line of the street as existing before the report was made. *Bliss* v. *Attleborough*, 227.

Alteration.

Petition, which was presented to and granted by selectmen of town, construed to be petition for relocation, and not for alteration of way, and hence not within power of selectmen to grant, town not having accepted R. L. c. 48, §§ 58–61, see *post*, 3.

Relocation.

3. A petition, presented to the selectmen of a town which had not accepted R. L. c. 48, §§ 58–61, averred that "common convenience and necessity require the relocation of a certain way or road in said town . . . for the purpose of establishing the boundary lines of said road or way, and making needed alterations in the location, grade, course and width thereof." The prayer of the petition was that the selectmen "proceed to relocate and lay out . . . and to establish the boundary lines of said way and to fix the grades thereof." In their order on the petition, made in 1905, the selectmen described it as a petition "for the relocation or alteration of the" way, and stated that they had "altered" the way "so that the course thereof as altered, shall follow" a certain course, "which location as now altered is as follows," describing it and giving the lines of a location of the way as laid out by the selectmen of the town in 1787. *Held*, that the action sought by the petition and taken by the order of the selectmen was intended to be, not an alteration of the way under R. L. c. 48, § 65, but a relocation, which the selectmen had no power to order, the town not having accepted §§ 58–61 of that chapter. *Holbrook* v. *Selectmen of Douglas*, 94.

Defect in highway.

4. At the trial of an action against a town under R. L. c. 51, § 18, to recover for personal injuries alleged to have been received by the plaintiff by rea-

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Way (*continued*).

son of a defect in the highway, there was evidence tending to show that a building was being moved on the highway in question by one who rightfully was on the highway for that purpose, that, in the process of moving, a rope was attached to the building and extended along and about eighteen inches above the surface of the street from the building across a crosswalk to a capstan, that, during the evening when the plaintiff was injured, the moving was interrupted while some overhead wires, which obstructed the progress of the building, were being removed, and that, after the building had stood still at a place near the town hall, with the rope taut, for about forty-five minutes, the plaintiff, in the darkness of the evening, not seeing the rope, attempted to cross the street on the crosswalk, tripped on the rope and fell. *Held*, that, assuming without deciding that there was evidence from which a finding that the rope was a defect would have been warranted, there was no evidence that the authorities of the town had notice of such defect or might have had notice of it by the exercise of proper care and diligence. *Craig* v. *Leominster*, 101.

Moving buildings on.

Under R. L. c. 52, § 13, and R. L. c. 26, § 2, person moving buildings on streets of cities must have permit from municipal authorities, and cannot legally so move building which is wider than permit specifies, see MOVING OF BUILDINGS, 1, 2.

Leaving of building standing for time in street in course of being moved was held under circumstances not to be defect in street, for injuries caused by which town would be liable, see *ante*, 4.

Private.

Determination of boundary line of parcel of land bounded in deed by private way, see DEED.

Suit under grade crossing act, St. 1890, c. 428, for damages due to obstruction or taking of private way, see DAMAGES, 5, 6.

Persons using private way opening into public streets, from which owner has not excluded public but at entrances to which he has posted notices stating its character, are entitled merely to rights of licensees and not to those of invited persons, see NEGLIGENCE, 68.

Assessment of damages in action of tort for trespass against one who interferes with qualified right of plaintiff by removing trees and shrubbery on portion of private way, to which plaintiff owns fee subject to rights of passage of other abutters, see TRESPASS, 3.

Acts of selectmen and water commissioners of town, in committing acts of trespass upon private way by attempting to construct street and dig trench for water main thereon when attempted layout thereof as street by vote was illegal and void, do not make town liable, but such officers are individually liable as joint tortfeasors, see TRESPASS, 1, 2.

WILL.

As to what parties may oppose allowance of will in Probate Court, see PROBATE COURT, 1.

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Petition for revocation of decree allowing will on alleged grounds, that when will was executed testator was of unsound mind and that executor who presented will for probate and procured its allowance knew this fact, held properly to have been dismissed on facts found, see PROBATE COURT, 2, 3.

Questions whether ruling limiting inquiry to certain period, and as to competency of testimony of one not qualified as an expert, at trial of issue as to soundness of mind of testator at time of making of will, see EVIDENCE, 2, 3, 10.

Action by one alleging herself to have been named as legatee in will, in which declaration did not contain allegations sufficient to ground action for conversion of property given plaintiff by deceased testator, and in which it was held that no action at law would lie by such legatee against persons who by conspiring together kept will from being offered for probate, see ACTIONABLE TORT; CONVERSION, 1.

WITNESS.

Cross-examination.

1. The extent to which the cross-examination of a witness shall be permitted to be carried is within the discretion of the presiding judge, and in its exercise the judge may exclude questions addressed to a plaintiff on cross-examination relating to matters whose connection with the issues on trial is too attenuated and remote for consideration. *Eastman* v. *Boston Elevated Railway*, 412.

Judge presiding at trial may in exercise of his discretion refuse to strike out answer of witness on cross-examination which, though not responsive to question asked, is germane to issue and is material and competent evidence, see PRACTICE, CIVIL, 7.

Impeachment.

2. In this Commonwealth it is settled law that, in the introduction of evidence affecting generally the credibility of a witness, the inquiry is limited to the reputation of the witness for truth and veracity, and, therefore, after a witness for a defendant has testified that he knows the reputation of the plaintiff for truth and veracity and that it is bad, it is proper for the presiding judge to refuse to allow the defendant to ask the witness whether he would believe the plaintiff under oath. *Eastman* v. *Boston Elevated Railway*, 412.

3. In an action by a woman against an executor for compensation for services alleged to have been rendered to the defendant's testator, the plaintiff testified that she took full charge of the testator in the daytime, that one M. took charge of him in the night-time, and that M. sometimes relieved her during the daytime while the plaintiff was marketing for the testator. M., being called by the plaintiff, testified that the plaintiff waited on the testator during the day and took care of him unless it was something she could not do alone, when the witness was called to help her. The defendant then offered to show that M. had said that M. herself did all the work

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Witness (*continued*).

night and day and that nobody else did anything for the testator. The presiding judge excluded the evidence. *Held*, that the exclusion of the evidence was erroneous, as the statement, if made, was inconsistent with the statement made by M. upon the stand in a material matter, and had a bearing upon the degree of credit to be given to her testimony. *Snow* v. *Adams*, 251.

Qualification of Expert Witness.

See EVIDENCE, 6.

Refreshing Recollection.

Official registrars at recount of vote may refresh recollection from tally sheets then kept by them and testify therefrom at trial of election officer charged with wilfully making false count and report of votes, production of original ballots not being necessary, see FALSE COUNTING AND REPORTING OF VOTES, 3.

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